United States Court of Appeals

for the Second Circuit

APPENDIX

No. 76-7631

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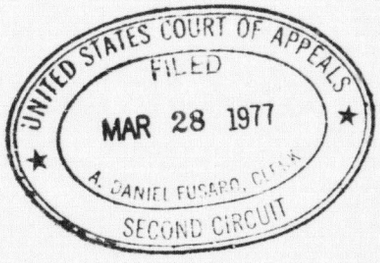
In the

United States Court of Appeals

For the Second Circuit

ORECK CORPORATION, *Plaintiff-Appellee,* vs. WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO., *Defendants-Appellants.*	Appeal from the United States District Court, Southern District of New York. Honorable **Richard Owen,** Judge Presiding.

JOINT APPENDIX—VOLUME II.



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MR. SILVER: This is the deposition of Jack D. Sparks, vice-president of Whirlpool Corporation, and a director of the corporation, which was taken on August 1st, 1973 at the offices of the law firm of Malcolm A. Hoffmann, who is representing the plaintiff in this case.

We will begin on page 42, line 7:

"Q Do you have any recollection of your impressions of the job done by Bruno" --

* * *

* * *

(Reading continued as follows:)

"Q Do you have any recollection of your impressions of the job done by Bruno, New York, in connection with the sale of vacuum cleaners in the period 1958 to 1963?

"A Yes, it was probably one of the better jobs of all our distribution, but it came as a result of heavy subsidy, and very profitable to us.

"Q When you say heavy subsidy, you mean sold at low prices to Bruno? Is that what you mean?

"A It took heavy promotional investment to get the job done.

"Q In connection with Bruno's sales, you say it was one of the better jobs, is that right?

"A Yes, sir.

"Q Was it involume the best job being done in the United States?

"A I believe it was, yes.

"Q In that connection, did you not in considerable part attribute the good performance of Bruno, New York, to the activity of David Oreck at Bruno, New York?

"A Yes, in a large measure, plus the subsidies.

"Q Mr. Oreck made at least in relationship to his

selling of vacuum cleaners a good impression on you and the Whirlpool Company, isn't that so, during that period from '58 to '63?

"A Yes, sir.

"Q Was that one of the reasons why you designated Oreck as a national distributor for vacuum cleaners when you reached the corporate decision in '63 to have such a distributorship?

"A That is one of the reasons. He was a known quantity to us.

"Q What other reasons did the company have for designating the Oreck Corporation as the national distributor for vacuum cleaners in 1963?

"A What other reasons?

"Q Yes, besides David Oreck being a known quantity to you.

"A The fact that he was available.

* * *

* * *

"Q Can you think of anything else?

"A No.

"Q Did you have any choices? Could you have found another company to do the job?

"A Yes, I imagine we could, if we had worked at it.

"Q Certainly, if you were not satisfied with what you knew of Mr. Oreck, you would have worked at it, isn't that so?

"A Yes, sir.

"Q Do you remember whether or not you had anything to do, you personally had anything to do with the designation of the Oreck Corporation as a national distributor?

"A Yes, sir.

"Q Did you participate in meetings with David

Oreck looking towards that end, that is to say, looking towards the designation of Oreck or an Oreck formed company as a national distributor for Whirlpool vacuum cleaners?

"A Yes.

"Q Do you have any recollection of when you first met with Mr. Oreck concerning this subject?

"A I believe it was in April of '63.

"Q If I supply the datem April 10th, does that mean something to you?

"A Ten doesn't, but April does, yes.

"Q Do you remember where the meeting took place?

"A Yes, sir, Americana Hotel.

"Q Do you remember who was present at the meeting?

"A David Oreck and myself.

"Q Just the two of you?

"A As I recall, yes.

"Q No one else in the --

"A Not that I recall.

"Q Was it in a hotel room?

"A Yes, sir.

"Q Mr. Oreck's room?

"A No, my room. I was not here for that purpose, by the way.

ws8 "Sparks 640

"Q About how long did the meeting take place?

"A I don't recall.

"Q Half an hour, three hours?

"A No, we had to talk at least two hours.

"Q Can you give us, if not in words, the substance of what took place at that meeting in April 1963 at the Americana Hotel with David Oreck?

"A I believe I told him that we were interested in reentering the vacuum cleaner business, but more importantly we were -nterested in establishing a new channel of distribution which would give us access directly to the major dealers in the company -- -- in the country; that the vacuum cleaner was only a means to an end.

"Q Would you be good enough to explain that a little more? You say the vacuum cleaner was only a means to an end. What was the end?

"A We were interested in establishing a channel of distribution to these major dealers in the United States.

"Q When you --

"A Directly.

"Q When you say a means to an end, do you mean having in mind that these distributors might also handle

other Whirlpool products besides the vacuum cleaner?

"A If they were developed, yes.

"Q Was it a part of the sense of your communication to Mr. Oreck at that meeting that the development of those distributors would be his function or the function of his corporation, Oreck Corporation?

"A Well, to keep the record right on our terminology here, he was to be the distributor. And then he, in turn, was to establish dealers. He would be the only distributor. And that was the situation.

"Q So when you spoke of a means to an end, you meant the end would be the creation of good dealers, is that right, who might handle in addition to vacuum cleaners sooner or later other Whirlpool products? Is that the meaning of your testimony?

"A We wanted to establish a one step distribution system which took us directly to the major dealers in this country and in the event other products would lend themselves to that type of distribution, we would put them in that system. Those products did not exist at the time of our conversation, however.

"Q Do you recall whether or not this meeting with Mr. Oreck was at your invitation?

"A Yes, sir.

"Q What did you do, call him up or write him a letter?

"A I believe I called him and told him I was going to be in the city.

"Q Do you remember what you said in that conversation? You had some matter of interest to him or something of that order?

"A I would feel that's probably what I said, yes.

"Q Sufficient interest for him to come to the Americana Hotel and meet with you?

"A Yes."

MR. SINGER: We are now going to be going to page 50, line 19. We left off at page 47, line 22, and we are now going to page 50, line 19:

"Q Tell me, sir, in your conversation with Mr. Oreck at the April meeting at the Americana Hotel, did you outline the functions which you wanted Mr. Oreck to perform for Whirlpool?

"A Not specifically.

"Q In a general way?

"A In a general way, I outlined what our objecgives were.

"Q Do you remember what they were?

"A Yes, sir.

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"Q Let me modify that question somewhat.

"Do you remember what objectives you articulated or told to Mr. Oreck at the time?

"A That we were interested in establishing a distribution system which would take product directly to the major dealers in the United States, and that we would like to use the vacuum cleaner as the product.

"Q Did you --

"A And I also, I believe, outlined at that meeting that based on our past experience with our own distribution which proved not profitable or successful that we were interested in selling high end types of products in a one step distribution system.

"Q When you say high end, are you referring to the vacuum cleaner?

"A Yes, sir.

"Q By high end, are you referring to price?

"A Yes, sir.

"Q Are you also referring to quality?

"A Quality, yes, sir.

"Q Are you suggesting that you were offering to Oreck a distributorship for a vacuum cleaner which, because of its quality and design, internal features, was a high priced vacuum cleaner?

"A I was offering to Oreck at the time an opportunity to create a distribution system along the lines that I have already mentioned to sell high end or -- high end vacuum cleaners, yes, sir.

"Q Had the high end vacuum cleaner, so-called, already been designed and created by Whirlpool?

"A No, we had no specific product in mind at that time.

"Q Did you have in mind that you would design a vacuum cleaner for Oreck Corporation to sell which would be different from other vacuum cleaners being sold by Whirlpool?

"A Within the framework of the tooling that already existed.

"Q Do you mean that there was an existing tooling which created vacuum cleaners with which being sold by Whirlpool? Were they also being sold by Sears, Roebuck?

"A Some of the tooling had to be common, yes, sir.

"Q Between Whirlpool and Sears?

"A Yes, sir."

MR. SINGER: There is then colloquy as to the answer.

THE COURT: Just keep going.

MR. AGEE: Go to page 53.

MR. SINGER: Yes.

(Reading continued as follows:)

"Q Sir, what other matters do you remember were articulated to Mr. Oreck? What other positions did you take as to what you expected from Oreck if he became the national distributor for Whirlpool vacuum cleaners?

"A I believe I've given you the essence of our first conversation.

"Q The first conversation then set up the need for a mational distributor? You informed him of that, is that right?

"A Set up the desire of it. We didn't really need it.

"Q You indicated that you thought it would be a way of getting access to major dealers for other Whirlpool products, is that correct?

"A Products at the time of our conversation did not exist, but could come into being later on."

MR. SINGER: We are leaving off at page 53, line 19, and going to page 80, line 23:

"Q Did you recognize that there would be substantial start-up costs that Oreck would experience in

getting started as a national distributor for Whirlpool of vacuum cleaners?

"A I recognized that there would be costs.

"Q Did you realize that they would be substantial costs? That you could not go in this for 50 bucks.

"Can we agree that 50 bucks is insubstantial?

"A I would agree.

"Q How about five million, is that substantial?

"A In relation to what?

"Q In relation to establishing a distributorship nationwide for Whirlpool's vacuum cleaners.

"A I don't know that I can reply to that. That's --

"Q Sir --

"A Five million, that's a figure out of the air. I don't know how to reply to that.

"Q Do you have any idea what was expended?

"A I don't recall.

* * *

* * *

"Q You knew a sizable sum of money or a substantial sum of money would have to be invested for Oreck to get started as your national distributor, did you not?

"A I knew that money would have to be invested.

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MR. SINGER: We will go to page 83, line 1:

"Q You have been in this business a long time,

haven't you?

"A Yes.

"Q Do you know what is involved in providing complete national coverage for the sale of Whirlpool vacuum cleaners? Is there travel involved?

"A Yes.

"Q Is there maintenance of an office involved?

"A Yes.

"Q Is there employment of skilled people involved?

"A There is employment of people.

* * *

* * *

"Q And what did you know about the Oreck history, in terms of volume sales, as to the very same machines or

jws "Sparks 660

of the same machines with modifications that Whirlpool had previously sold, in terms of volume sale?

"A Well, he sold -- he sold these units, yes.

"Q And in good numbers, or that is to say, in good volume?

"A Well, again, I don't know what you mean by good volume.

"Q Satisfactory to Whirlpool, is what I mean by good volume.

"A For the time, yes.

"Q What time are we talking about noe?

"A I assume if you are talking about beginning, we're talking about 1963.

"Q How about '64?

"A '64 and '65.

"Q And '65.

"Something happened in '66 that changed the situation in anyway?

"A Well -- changed what situation?

(Continued on next page.)

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mpl "Sparks

T6 "Q Well, you said he sold them in satisfactory volume, if I understood your testimony correctly, during the year '63, '64, '65. Is that right?

"A Yes. I said he sold them in satisfactory volume for the time; yes, sir, I said that.

"Q Now, was there any change in that circumstance, taking place in the year '66?

"A Well, I believe, sir, that was about the time that the emphasis on the distribution changed.

"Q We are talking now, of volume sales. Was there a falloff of volume in '66, to your knowledge, in the vacuum cleaners sold by your corporation?

"A As I recall, '64, '65, '65 over '64 was a modest gain, as I recall. '66 was modest. '67 went down.

"Q Substantially down?

"A I can't -- see, I cant recall the exact numbers. I've only got impressions, really.

"Q Do you have any reason for that happening in '67?

"A No, I don't.

"Q What happened in 1968, in connection with volume?

"A I believe it went up slightly.

"Q Then '68, we have this meeting, do we?

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mp2 "Sparks

"A Yes, sir.

"Q Did you, in the course of the meeting, or any representative of Oreck, assert to Mr. Oreck that the reason for termination under the contract was the failure of the Oreck Corporation to sell a sufficient number of vacuum cleaners?

"A No, sir.

"Q And in fact, that was not a reason for the termination, isn't that so?

"A No, sir.

"Q I am sorry. When you say 'No, sir,' you mean?

"A It was not the reason.

"Q It was not the reason.

"Now, did you make any criticism in the meeting in '68, taking place in the Spring and prior to the termination notice, did you make any reference to any misrepresentation or poor public relations statements or diminishment of the name of Whirlpool resulting from the activities of Oreck Corporation as the Whirlpool distributor?

"A As I recall, I did not.

"Q And that, then, was not a reason for the termination; is that right?

"A Not in my mind, sir.

"Q Now, was there, to your knowledge, prior to

mp3 "Sparks

the termination in '68, any gross failure of the Oreck Corporation to make good on warranties or any contractual relationships that Oreck had with the public, with the consumers of the vacuum cleaners?

"A Not that I have any personal knowledge of.

"Q That was not a reason for the termination; is that right?

"A No, sir."

Leaving page 385, line 8, and going to page 402, line 17:

"Q Did -- was there a time during the existence of the Oreck franchise when the productive facilities of Whirlpool for the making of vacuum cleaners was inadequate to meet the demand that the Oreck Corporation had for these machines?

"A Oh, inadequate would not be the word.

"In a production operation, there are always times when things occur; material shortages, labor problems, freight car shortages. You name it.

"The facilities were more than adequate when everything was under control.

"Q When you say the facilities were more than adequate when everything was under control, you are talking about the manufacturing facilities, are you

mp4 "Sparks

not?

"A Yes, sir. I assumed that's what you were talking about.

"Q Yes, indeed. They were sufficient to turn out vacuum cleaners in sufficient volume to meet the demands placed upon it by Oreck; is that right?

"A Yes, sir.

"Q And indeed, could they have turned out vacuum cleaners during the period of the franchise in larger numbers than those purchased by the Oreck Corporation?

"A Well, that --

"Q Im talking now of the production facilities of Whirlpool.

"A I'm only hesitating, searching for the correct answer to give you, sir.

"Q The truth, of course.

"A That's obvious. I believe in that whole-heartedly. Facilities can be expanded to meet peak demands at any given time by -- you add a second shift. You cannot quite double your capacity, but you can increase your capacity.

"We were not using all of the capacity, no; but we were using enough capacity to satisfy the plant."

We are leaving page 404, line 6, to go to page 487.

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mp5 "Sparks

line 14:

"Q Now, do you have any knowledge, Mr.Sparks, as to what the situation was in relation to the number of active wholesale distributors which Oreck had in the spring of 1971?

"A I can't recall them here today.

"I recall seeing some correspondence, and in my conversations with Mr. Oreck, he mentioned a number, but it's gone out of my head.

"Q I put to you the number 945. Does that serve to jog your recollection?

"A That sounds like the number that he had given me before, yes, sir. Now, that's the number he gave me. I have no way of verifying it. He said it.

"Q Do you have any reason to challenge it?

"A No, I have no reason to challenge it.

"Q Do you know anything about the number of service offices that Oreck Corporation had access to during the spring of '71?

"A Again, that was in conversation and correspondence, but the number escapes me.

"Q I put to you number 200. Do you have any reason to doubt that figure?

"A I have no reason to doubt it or accept it.

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mp6 "Sparks

I just listen to it.

"Q You have reason to accept it, have you not? It was said by Mr. Oreck.

"A I accept it, if he says it.

"Q Now, tell me generally, Mr. Sparks, Whirlpool deals with quite a large number of distributors in the handling of its products, isn't that so, its various products?

"A Not a large number; no, sir.

"Q About how many, would you say?

"A On our domestic products, there are probably 45, of which 17 are factory branches, give or take one or two, Mr. Hoffmann. I am reaching a little here.

"Q Among those distributors, was it not your testimony that the normal contract is a -- a two-year contract?

"A No, it's one.

"Q One year, I'm sorry. One-year contract.

"A Yes, sir.

* * *

mp7 "Sparks

* * *

MR. SINGER: October 16, 1973, page 572, line 23:

"Q During this period 1968 to 1971, during the extension agreement, the Oreck Corporation was selling vacuum cleaners in quantities satisfactory to Whirlpool, isn't that so?

"A Well, he was selling vacuum cleaners, and we had no quarrel with the amounts he was selling, and we were delighted he was selling vacuum cleaners, for his sake.

mp8 "Sparks

"Q When he sold them, didn't you make profits on them? When I say 'you,' I mean Whirlpool.

"A Yes.

"I believe I -- again, I testified earlier that earlier years of the relationship were not profitable and the latter years were.

"Q We're talking now about 1968 through 1971 and we can accomplish so much more, Mr. Sparks, if you would just be kind enough to answer the questions I have put to you.

"You were making a profit, were you not, during this period '68 to '71, on the vacuum cleaners sold by Oreck which they had purchased from Whirlpool?

"A We were making a profit, yes, sir."

We are leaving off at page 573, line 19, and going to page 599, line 13:

"Q Do you remember what it was that Mr. Oreck said at this meeting whic-h you refer to when you say:

"'At this meeting you basically reiterated the contentions and positions stated in your letter of May 12th.'

"A I don't recall specifically what he said, but as I believe I've testified previously, he reiterated the time and the effort and the investment, etc., that he's

mp9 "Sparks

put into the program.

"And also indicated legal action was necessary.

"Q Was it the time and effort which Mr. Oreck said he put into the program that you found to be generally inaccurate?

" A That -- I believe that statement refers to the various allegations.

"Q You have been looking at it and reading it and you said that now?

"A Yes, sir.

"Q You believe it refers to the various allegations?

"A Yes, sir.

* * *

mpll "Sparks

* * *

MR. AGEE: Page 630, line 2:

"Q What was so important to you about that date, December 31, 1971, other than the fact that in the contract it is listed as a termination date for the distribution?

"A That was the important part.

"Q At the end of that year, do you know whether or not Whirlpool had at its disposal any unsold inventory of vacuum cleaners?

"A Yes, sir, we did.

"Q Do you know whether or not before the end of

mp12 "Sparks

that year Mr. Oreck had requested that you sell vacuum cleaners to the Oreck Corporation which, in fact,you did not sell to them?

"A Yes,sir, that's true.

"Q What was the reason for that?

"A Our agreement had terminated. He was fully aware of the fact that it ended December 31st, and that ceased our relationship as it had to do with the selling of vacuum cleaners.

"Q That applied, did it not, even to requests made by Mr. Oreck for vacuum cleaners which were made prior to the close of business on December 31, 1971?

"A We had made it perfectly clear to Oreck Corporation that they had to get their product out of there by December 31st, and that's what they were going to get. And they knew that well in advance of that date.

"Q Had there been any vacuum cleaners produced by Whirlpool for use by Oreck which Whirlpool declined or refused to deliver to Oreck subsequent to December 31, 1971?

"A The inventory of Whirlpool vacuum cleaners that were left were vacuum cleaners that were made for Oreck. And we did not ship those after December 31st.

"Q Did they bear the Oreck logo?

mpl3 "Sparks

"A Well, it had the Whirlpool logo on it and there was Oreck's identification on the cartons and literature.

"Q Think of the metal of the machine. Was there Oreck's identification on the metal of the machine?

"A I don't know.

"Q You don't know one --

"A I don't know.

"Q You do know about the cartons?

"A I know about the cartons.

"Q But you don't know about the metal of the machines? How is that? Do you know why you should know about one and not the other?

"A Because I recall a conversation where somebody said it would cost some money to change the cartons.

"Q Do you recall when someone said to you that it ought to cost five or six bucks for us to take the 16 staples out of the cartons, create new cartons or take the identification off the cartons and also to take the metal stamping off those machines? Do you recall anything like that?

"A I was told there was cost, Mr. Hoffmann, but I don't recall what it was.

* *

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mpl4 "Sparks

* * *

MR. SINGER: Continuing at 632, line 21:

"Q Do you recall how many units you had of Oreck vacuum cleaners at the end of 1971?

mp15 "Sparks

"A I believe I stated previously -- and I had to estimate. I wasn't sure. There was somewhere -- some 20,000 as I understand it. I'm not quite sure as to the exact amount. I really don't know the exact amount. It was in excess of 20,000 units.

"Q In excess?

"A Yes."

Continuing at line 13 of page 633:

"Q As to these 21,000 more or less machines in inventory, do you know whether or not Mr. Oreck or Oreck Corporation were willing to pay full price for those?

"A Yes, it was my understanding -- well, I know. He called me and said he wanted to buy them and we said no.

"Q He would buy them at the regular price?

"A Oh, sure.

"Q Do you know what that price was?

"A I don't recall, no."

MR. AGEE: October 17, page 709.

MR. SINGER: This is a deposition of October 17, 1973, taken at the law offices of Malcolm A. Hoffmann, of Jack D. Sparks, Vice-President, Whirlpool Corporation, page 709, line 17:

"Q Do you recall or have any knowledge of any

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mp16 "Sparks

negotiations with Oreck as to the purchase of the inventory and the payment of any outstanding obligations to Whirlpool?

"A I believe I said in previous testimony that David Oreck had called me with the request that he buy the inventory, and he said -- he said that he would be willing to pay full price for it. I had no knowledge whether he would or not. And --

"Q And you had been dealing -- when I say 'you,' of course, I mean Whirlpool -- since 1963?

"A Yes, sir.

"Q Any indication that Oreck was a poor credit risk over that period of time?

"A No, I wouldn't classify him as a proor credit risk. Slow pay on occasion."

* * *

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mp17 "Sparks

* * *

We are stopping on line 15 of page 16 and going to page 35, line 12:

"Q Whirlpool has been selling products to Sears Roebuck for quite a long time, isn't that so?

"A Yes, sir.

"Q How long would you say?

"A Over 58 years.

* * *

mpl8 "Sparks

* * *

Going to page 67, line 19:

"Q Are you prepared to say, Mr. Sparks, that Oreck was limited to the higher priced lines as you have described it?

"A I take exception to the word limited because never in our discussions was he limited to anything. We were dealing in a concept.

"Q You did not decline -- you, Whirlpool, did not decline to sell Oreck Corporation vacuum cleaners which were not in the higher priced line that you just referred to in your testimony?

mp19 "Sparks

"A Well, that's the way it ultimately -- that's ultimately the way it finished. But that certainly wasn't the way I went into it.

"Q You went into it with the idea that he might sell the higher priced line, is that right?

"A Yes, sir.

"Q But in point of fact orders were placed and they were filled, were they not, for vacuum cleaners which did not fall in the higher price line, isn't that so?

"A Yes, yes.

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MR. AGEE: May 22, 1974, your Honor. Page 216, line 4:

"Q Do you know whether the Oreck Corporation ever sold vacuum cleaners via parcel post?

"A They are also in the mail order business but I don't know if they specifically utilized United Parcel, airmail or what.

"Q Did you ever speak to Mr. Oreck concerning the subject matter of his selling vacuum cleaners by mail order?

"A Did I ever speak to him?

"Q Yes. You, Mr. Sparks?

"A As I recall in previous testimony I had had conversations with Mr. Oreck. I don't recall specifically when, about the mail order b usiness.

"Q Your answer is, you did have conversations?

"A I had conversations. I can't give you details, time and place.

"Q Did you attempt to have Ordck stopped from selling by mail order?

"A No, sir.

"Q What was the position taken concerning Oreck's mail order business by you in these conversations?

mp2 "Sparks

"A I expressed my opinion that it was a form of distribution that had not been considered in our original negotiations and was completely away from what we talked about.

"Q Did you suggest to Mr. Oreck that he stop selling vacuum cleaners by mail order?

"A No, sir.

"Q Isn't that the sense of what you just said?

"A I gave him my observations.

"Q Without any recommendation for action or for stopping action?

"A No. I said it was a mistake.

"Q You, Whirlpool, speaking for Whirlpool, the supplier of vacuum cleaners to Oreck Corporation which is the distributor for the vacuum cleaner, said to Oreck Corporation you thought it was a mistake to sell by mail order. Is that it?

"A Yes.

"Q Could you possibly have used any stronger language than that? In effect you didn't think they should continue dealing with him?

"A I don't recall that I used that kind of expression. In my years of experuence with independent distribution, there is so much you can suggest.

mp3 "Sparks

"Q You were suggesting that you would prefer if he stopped, weren't you?

"A I was suggesting that I would be much happier if we got back on the original track.

"Q Which meant in accordance with what you just said, not selling by mail order?

"A I didn't tell him not to sell by mail order."

THE COURT: Are we going to read that next question and answer?

MR. AGEE: Drop down to line 18:

"Q You can tell us, if you want to, can't you, whether or not when you said you thought it was a mistake fo- Oreck to have engaged in the mail order business and also contrary to the original plan, it was your purpose to try to persuade Oreck not to sell further by mail order? Wasn't that your purpose in making those remarks?

"A Sir, I can only suggest to independent distributors. I can't tell them what to do.

"Q Can we agree then that what you were doing was suggesting?

"A I was suggesting that it was a mistake and we ought to get in a right track.

"Q Another way of saying that is that you were suggesting to him that you ought to get back on the

mp4 "Sparks

right track, that he should drop mail order. Isn't that what you were suggesting?

"A No, sir.

"Q You made a distinction between what I just said?

"A He reacted like all independent distributors. He ignored me.

"Q Let's come back to my question. We agreed when you talked about coming back to the original purpose that what you meant was, you suggested that that was the thing to do, right?

"A Get back to the original purpose, yes, sir.

"Q That was your suggestion?

"A Yes, sir.

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mp5 "Sparks

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"Q Do you know of anybody else in the Whirlpool Corporation, other than yourself, who at any time spoke to Mr. Oreck concerning continuing the mail order business?

"A As I recall, Mr. Sweet did.

"Q Mr. Sweet?

"A Yes.

"Q What do you know of that?

"A Not too much. I recall some conversations with Mr. Sweet as a result of his conversations with Mr. Oreck.

"Q About when did they take place?

"A Some time in the period. Perhaps from -- during the period that Mr. Sweet was in charge of the account, and that's in the record here. I can't think of when that was.

"Q Approximately '69 or '70?

"A I believe Mr. Sweet was gone then.

"Q Approximately what period of time?

"A It would have to be in the '66 to '68.

"Q Mr. Sparks, tell us, as best you can recall, what you learned at Whirlpool concerning what passed between Mr. Sweet and Mr. Oreck concerning subject matter of mail order business?

"A As I recall, Mr. Sweet had conversations with me and reported conversations he had with Mr.Oreck wherein he advised Mr. Oreck much along the lines that I did previou. ly.

"Q He suggested that it was contrary to the purpose of the arrangement for Oreck Corporation to be in the mail order business, being careful however in making the suggestion and not to instruct Mr. Oreck to get out of the mail order business? Was that approximately what Mr. Sweet reported to you?

"A I can't recall what Mr. Sweet said specifically to Mr. Oreck. It's just too long ago. I can't recall specifics.

"Q He implicated the Whirlpool dislike for Oreck's being in the mail order business? Do you recall that much?

"A The general flavor of the conversation was very similar to the conversations I had had previously and which I testified to. I can't recall the specific details of his conversation or of mine with Mr. Sweet, to be frank with

mp7 "Sparks

you.

"Q But you do know" --

MR. TUROFF: Your Honor, we are going through the same thing; the witness does not know.

MR. HOFFMANN: That is an unfair characeterization, but I am prepared to go on.

THE COURT: I will sustain the objection. Let's go on to another subject.

MR. HOFFMANN: Line 19 on page 223:

"Q Can't we at least agree on this, that both you and Sweet were against it, while Oreck was for it? Can we agree to that?

"A We were for the distribution that we had originally planned. We weren't against anything. We were for something.

"Q You were for something that didn't include the mail order business for Oreck, isn't that so?

"A The original understanding.

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MR. AGEE: Page 254, line 16:

mp "Sparks 710

"Q Indeed, sir. You sell Sears, isn't that right?

"A Oh, I see what you mean. Whirlpool Corporation sells for Sears.

"Q And for some time it sold to the Oreck Corporation?

"A Yes, sir.

"Q For the period of time when Oreck Corporation was the distributor, was there any other outlet for Whirlpool than those two?

"A No."

257, line 16:

"Q Mr. Sparks, do you recall having received a report concerning the accomplishment of Oreck Corporation in selling Whirlpool vacuum cleaners prior to the 1971 termination?

"A I may have.

"Q Do you have any recollection of having seen such a report?

"A I don't know. I don't recall specific reports.

"Q Mr. Sparks, would you be good enough to look at Oreck's Exhibit 55 for identification. Tell us, if you can, whether you remember having seen this document before?

"A I have seen this document before.

"Q Have you seen it recently in connection with your deposition?

"A I believe I have.

"Q Do you remember having seen it at or about the time when it was written?"

There was no response from the witness.

"Q That is to say, following its date of April 30, 1971?

"A I believe I can recall this, yes.

"Q Was this document considered by you and by anyone else involved in connection with a decision reached by the Whirlpool Corporation to terminate the Oreck distributorship?

"A No, because there was no decision to be reached.

"Q I beg your pardon, sir?

"A There was no decision to be reached about termination.

"Q What do you mean by that? It had already been reached?

"A Yes, sir. The agreement we were operating under at this point of time terminated by its own terms. As I previously stated.

"Q There was no opportunity afforded to Whirlpool

to extend the limit beyond the future term?

"A We had no desire to do so.

"Q When you read this, did this in any way suggest to you that it would be desirable to do so?

"A No, sir.

"Q Tell me, sir, in terms of sales of vacuum cleaners, Oreck Corporation sold them in good quantity beyond the expectation or the wildest dreams of Whirlpool, isn't that true?

"A I don't know what you mean by that statement.

"Q In numbers, numbers of vacuum cleaners sold. The Oreck Corporation sold all units that could reasonably be anticipated it would sell, isn't that true?

"A I had no expectation or anticipations during this period of time.

"Q You didn't care whether they sold one or a million?

"A Apparently I was delighted that he was doing well and was happy with it, but beyond that I had no expectations or feelings one way or the other.

"Q It didn't make any difference howwell he did, there was no change that his distributorship would be extended beyond termination day; is that what you are saying?

"A Yes, and all parties were aware of that.

"Q Nothing could be done that would make Whirlpool change its mind; is that your testimony?

"A Nothing could be done go change my mind.

"Q Yours was the important mind with regard to this matter?

"A Yes, sir."

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"Q Mr. Payne, in fact, you thought that the promotional efforts of Oreck Corporation were paying off, did you not?

"A At this time, no.

"Q What time? By 1968 they were paying off, weren't they?

"A No, by 1968 we were at the low point of our total business relationship with them. Their sales in 1967 had been less than any year prior to that, and the profitability, very little of which was ever apparent in the early years, had disappeared and I believe losses were being incurred in 1967.

"And Oreck's position with respect to the minimum quantity of products to be purchased had fallen

behind the minimum levels by early 1968, March of 1968.

* * *

* * *

"Q Without taking the time to find the statistics, does your recollection accord with mine that in the years 1967 and 1968 they went up over '66? You said before '66 was the low year.

"A No, I think '67, the year ending March of '68 was the low ebb of the Oreck sales. As I recall them, they were calculated from March to March for some reason.

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* * *

"Q Isn't it true that in 1968, certainly at the earlier part of the year, you had no source for dissatisfaction with the Oreck account, isn't that so?

"A That's true. I had excellent relations with th- Oreck people."

Page 241, line 19. Technically this is now January 15, 1974. However, your Honor, it is all in the same volume:

"Q The next sentence is:

"'It appears that during the month of January, 1970, we will ship the 100,000 electric cleaner into your distribution system. Congratulations on achieving this historic milestone.'

"Sir, I ask you in the face of that was it not your purpose to congratuate Mr. Oreck on volumewise doing a good job as a Whirlpool distributor of vacuum cleaners?

"A Yes."

3/3 p.m.

jwas "Payne

"Q Now there came point in time when Oreck Corporation was terminated as a Whirlpool vacuum cleaner distributor, isn't that so?

"A Yes. The agreement was not extended.

"Q Are you making a distinction between not extending an agreement and terminating an agreement?

"A As I understand it, the agreement was not renewed or extended beyond December 31, 1971.

"Q Did you have anything to do with the decision of Whirlpool not to extend or to terminate the agreement?

"A No.

"Q You were not consulted in the matter?

"A No."

* * *

* * *

"Q Did you nurse any hope at all as of the time you wrote this letter that Oreck might be continued past the first of the year in 1972 and so on?

"A Yes.

"Q Now came the end of the road and Oreck Corporation was canceled. Was there an inventory of Whirlpool vacuum cleaners which had been manufactured for use by Oreck?

"A Yes.

"Q Do you know how large that inventory was?

"A Approximately. Yes, I do.

"Q Please tell us.

"A We had approximately 20,000 upright vacuum cleaners and 8,000 electric attachments.

"Q Any canisters?

"A No canisters.

"Q Do you know whether or not the Oreck Corporation wanted to buy that inventory?

"A Yes.

"Q What can you tell us approximately would it have been worth to Whirlpool if, in fact, it had sold this inventory to Oreck?"

THE COURT: Skip to the next question.

(Reading continued:)

"Q Do you know what price was charged by Whirlpool to Oreck for the vacuum cleaners of the type in inventory at the time of the cancellation?

"A Yes.

"Q What was that price?

"A Approximately $29, and $30 for the two models of the upright.

"Q Could we say within a reasonable tolerance of approximation that you could get the approximate value to Whirlpool by multiplying 20,000 by $30?

"A Yes.

"Q That would give us approximately 600,000, is that correct?

"A Yes.

"Q What about these 8,000 electric attachments, what did you charge Oreck for such attachments?

"A The price is fuzzy in my mind. I think it was in the 35, $36 range, but I'm not certain. I don't recall precisely."

* * *

"Q Could we come out with an approximate accurate figure if we took $35 and multiplied to by 8,000?

"A Yes.

"Q Just doing that in your head subject to correction of hard pencil and paper, that's approximately $280,000, is that not so?

"A Approximately.

"Q My client, Mr. Oreck, suggests to me that the price for the attachment was, in fact, $37.10. Having suggested that to you, does that in any way serve to refresh your recollection as to the more exact price?

"A I'm certain that he would know more precisely because he's got his data with him or recollection. I don't know exactly."

Jumping over to the next page, 331:

"Q So that if we were to take another $2 and multiply it by 8,000, we would have an additional 16,000 to add to 280,000, isn't that so? Just multiply two, representing the difference between the $35 that we used in our calculation and the $37 which is the figure that Mr. Oreck supplied. That would produce another $16,000, isn't that right?"

And jumping down to line 16:

"A I'll abide by it, yes.

"Q Then if I do addition, as well as I have done multiplication, we might add the 16,000 to 280,000 and come

jwas7 "Payne 734

up with $296,000.

"Now I take the $296,000 which represents this 8,000 attachments and I add to that $600,000 which represents the 20,000 vacuum cleaners. That makes a grand total of $896,000.

"Are there any other items which were in inventory at the time of the cancellation of Oreck besides the ones you mentioned, that is to say, besides the 20,000 vacuum cleaners and the 8,000 electric attachments?"

Question, dropping down a few lines:

"Q Can you think of any others, sir?

"A No, I can't.

"Q How about CVR-3000's?

"A I included them in the approximate 20,000 upright vacuum cleaners at 29 to $30.

3/4 "Q You include both CVR-2000 and 3000?

"A Yes. Perhaps it was slightly more.

"Q It could be more than the 20,000.

"If I were to suggest there were 20,000 CVR-2000 and 1,800 CVR-3000's, does that serve in any way to refresh your recollection?

"A Yes.

"Q You are nodding your head? You are saying yes?

"A Yes, I'm saying yes.

jwas8 "Payne 735

"Q So then we have an additional eighteen hundred, 3000's.

"What was the price for that machine at the time, the price charged by Whirlpool to Oreck?

"A Approximately $30.

"Q Now if I may do arithmetic again, I will multiply 1,800 by 30, and I come up with $54,000 which I shall add to 896,000, my earlier total, making a total of $950,000.

"Can you think of anything else that was in inventory of Whirlpool at the time of the expiree of the distribution contract which Oreck wanted to buy?

"A I don't recall.

"Q Have you allowed in the figures given so far for the CAP-33?

"A Yes."

Dropping down to the bottom of the page:

"Q Did you have any packaging made up for Oreck that was in inventory at the time of the expiree such as you described earlier today, the corrugated boxing?

"A We may have. I don't recall specifically. There may have been some cartons, leftover parts.

"Q Would it be fair to say that these leftover parts and the packaging might have a total of approximately

jwas9 "Payne 736

$50,000 had they been sold to Oreck?

"A I don't think so.

"Q It wouldn't be that high?

"A I think it was much less.

"Q Would you say in the magnitude of ten to 20,000 or less than that?

"A Less than ten. Probably less than five.

"Q In making my calculations which totaled $950,000, I included an item of 8,000 CAP-33's which we have multiplied by $35 to bring us a total of 280,000, and then we tagged on another $2 to comport with what Mr. Oreck says was the price of $37.10. I did not do the arithmetic involving the ten cents. I left that ten cents hanging in the air.

"It has been suggested to me that that figure ought to be augmented by another 300; that the real inventory was not 8,000, but 8,300. Does that comport with your recollection?

"A I don't recall specifically. It could be 300.

"Q It could be 300?

"A Eight thousand three hundred, yes.

"Q Rather than 8,000?

"A Eight thousand two hundred, 8,100. Precisely, I don't recall.

jwas10 "Payne 737

"Q If we were to assume that it is correct that it was 8,300, then I shall multiply 37 by 300. We have $11,100 more to add onto $950,000. That makes a grand total of $961,100, and the leftovers you estimated as being less than 5,000.

"Would it be fair to give them a value of, say, $2,500? Do you think that might be more or less accurate, such leftovers as the boxes or the spare parts?

"A I don't recall precisely one way or the other."

MR. TUROFF: I don't think that is the answer to that question.

MR. AGEE: I am trying to drop down:

"A I'm sorry, I don't see the line of reasoning or questioning that you are going --

"Q I am just questioning you here as to the leftovers and spare prrts. Do you think they were worth approximately 25? You said they were worth less than 5,000 when I asked you a question about them before.

"A I don't recall precisely one way or the other.

"Q You don't know?

"A No. A

"All I know is we got a purchase order for it and we sold the product and the goods.

"Q You had in inventory at the time of the

expiree of the Oreck distribution contract goods which you could have sold to Oreck totaling approximately $961,000, isn't that so? Approximately. I did not say exactly.

* * *

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MR. AGEE: 138, line 2:

"Q Do you know of any price factor other than the difference between the Sears and the Oreck price which might have been the subject of 5?

"A Yes.

"Q What would that be?

"A David's early products were very deluxe machines and they were fully featured and they included either an electric attachment or straight suction tools and they were high price top-of-the-line merchandise.

"The entire market at this point in time was descending down through various price levels and was becoming very price competitive."

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"Q Did there come a time when the AP 18 was abandoned? Let me put it to you this way: When Whirlpool discontinued production of the AP 18.

"A Yes.

"Q About when did that happen?

"A I believe in late '68 or early '69.

"Q When that happened, was it necessary for Whirlpool to scrap tools that had been used in the making of the AP 18?

"A I don't know if the tools were scrapped or not.

jwas16 "Payne 743

"Q Do you know whether they were useful in your making of any other vacuum cleaner?

"A No, they were in terrible state of repair. There were seven cracks in the nozzle die and our vendors were threatening us with all sorts of dire circumstances. If the die broke they could not complete the runs. We were afraid we'd abort an entire production run because of the condition of the tooling."

mpl "Payne 744

T4 "Q Was the AP-18 replaced by the CAP-33?

"A Yes."

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July 11, page 331, line 6:

"Q You have Sweet's August 29, 1968, letter in front of you, Mr. Payne?

"A Yes.

"Q You notice the third paragraph of that letter: 'It is understood that from time to time you may find it necessary to reiuest we' -- we, of course, referring to Whirlpool -- 'consider making either of the two products described without the Whirlpool name.'

"See that?

"A Yes.

"Q Do you know what those two products are?

"A The upright vacuum cleaner and the electric attachment.

"Q That would be, would it not, the CVR 1000, 2000, 3000 series and the CAP 33?

"A Yes, sir.

mp3 "Payne 746

"Q 'Such a request will, of course, be given proper consideration, but sole discretion as to whether we build them or not remains with Whirlpool.'

"Do you know whether or not, Mr. Payne, after August 29, 1968, Oreck Corporation requested that the products be manufactured for the private label?

"A I recall one request.

"Q Would you tell us about that, please, who made the request?

"A Marshall Oreck made the request.

"Q About when was it made?

"A I don't know.

"Q Where was the request made?

"A By telephone.

"Q To you?

"A To me.

"Q Tell us as best you can, the substance of the conversation you had with Marshall Oreck at that time.

"A To make an electric attachment with no name or with somebody else's name.

"Q Did you do anything about that request?

"A I declined it.

"Q Did you make that declination yourself, that is to say, did you do it without clearing it with your

mp4 "Payne

superiors?

"A I made it myself.

"Q You declined it. For what reason, sir?

"A I don't recall specifically.

"Q I suggest to you the reason was that Sears complained and objected to Oreck selling the private label, or selling vacuum cleaners in any way other than the way they were now selling, does that serve to refresh your recollection as to what took place?

"A No.

"Q You don't remember whether or not that happened?

"A It did not happen.

"Q You say it did not happen?

"A That's right.

"Q You say Sears did not make this objection?

"A That's right.

"Q You remember when this phone call took place within the limits of, say, a year, tell us theyear, '68, '69, '70,'71, '72, so forth?

"A No, I think it was in the period when I was having trouble bringing forth the new model and running out of stock of the old model. I had plenty of problems with the electric attachment, just bringing through the new

mp5 "Payne

model, under the Whirlpool brand, without the addition ofother brands and other colors and other modifications at that time.

"Q Did you have any other conversations other than this tele;hone conversation you have just described with Marshall Oreck relating to the matter of Oreck selling private label vacuum cleaners?

"A I don't recall any.

"Q Can you, now that you have fixed the time in reference to having the troubles, can you give us a year in which that happened?

"A I don't recall.

"Q Was it true in all, were the conditions you just described in your answer about the various forms of troubles you were having, true throughout the entire period of the Oreck distributorship?

"A I was having trouble through the second distributorship and producing the old electric attachment of AP 18, because of the age of the tooling, and the problems associated with the runs, and I was working diligently to bring through the model CAP 33 into the Oreck system and the inquiry occurred somewhere in the process during '69 or '70.

"Q Is it an inquiry made in relationship to the

mp6 "Payne

AP 18 or CAP 33?

"A I don't recall which.

"Q Do you have any recollection of whether or not at some other and different time from the telephone conversation you have just described, Marshall Oreck requested a private label CAP 33 type of vacuum?

"A I don't recall.

"Q Did David Oreck ever ask for a private label of you?

"A I don't recall.

"Q You don't remember one way or the other?

"A No, it is all wrapped up together, there were discussions of a private label. I don't know who said what to who.

"Q Mr. Payne, just a minute or two ago, you could only specify one such request, that being by telephone conversation with Marshall Oreck. Now you say they were all wrapped up, you can't tell one from the other. That means there was more than one request.

"A There was probably more than one discussion as to it.

"Q On the subject of making a private label vacuum cleaner for Oreck, is that what you're saying?

"A Electric attachment.

mp7 "Payne

"Q The 33?

"A I don't know.

"Q Electric attachment does not include 18?

"A It could be either one or the other or both, I don't know.

"Q You are saying you don't know whether it was the electric attachment or vacuum cleaner?

"A It was the electric attachment, we were phasing out the old model and making the new attachment and I think the inquiry came some time in that period of time.

"Q Late '69, early '70?

"A Somewhere thereabouts, I don't know.

"Q I put it to you, Mr. Payne, that on September 18, 1971, you had a conversation with Marshall Oreck concerning Whirlpool making private label cleaners for Oreck's customers. Do you have any recollection of that?

"A No. September 18, 1971?

"Q Yes.

"A Announcements had already been given franchise would conclude September 30, 1971. I don't recall it but there was no time.

"Q There was no time for the conversation?

"A There was no time to bring forth a new model

mp8 "Payne

under a new brand.

"Q No time to make private labels?

"A Within the franchise.

"Q Who said anything about the franchise other than you? I put it to you that there was such a conversation concerning Whirlpool making private label cleaners for Oreck customers. I said nothing to you of a franchise.

"Are you trying to decide whether or not such conversation took place by reference to a reasoning process rather than to your memory?

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mp9 "Payne

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"Q I also suggest to you that in the course of the conversation, Marshall Oreck said, 'Who else sells vacuums made by Whirlpool who would object, is it Sears?' And that you answered, 'They are the only other customer we make vacuums for.'

"Do you have any recollection of that?

"A I do recall something from the conversation, that if other private labels were to be made, that we would make them ourselves but I don't recall Marshall's

mp10 "Payne

direct statements that you have made or my responses that you are saying."

THE COURT: Do you want to reserve your right as to Mr. Payne?

MR. TUROFF: Yes.

THE COURT: You may.

MR. AGEE: We go to the deposition of John Steeb.

MR. TUROFF: May I indulge and ask counsel to give me the same courtesy of letting me look at his transcript; I don't seem to have Mr. Steeb's transcript here.

MR. AGEE: John Steeb, your Honor, deposition taken September 23, 1974, page 19, line 15 -- unfortunately, the lines are not numbered:

"Q It was during that period of time, somewhere during that period of 1957 to 1960, that you had something to do with the production of vacuum cleaners which were sold to Simpson-Sears, wasn't that your testimony?

"A I can't be certain of the timing, the dates.

"Q But that was while you occupied that position, wasn't that so?

"A As I seem to recall, sir.

"Q So that would place it in time within three years, would it not, from 1957 to 1960?

"A Yes, sir.

* * *

* * *

"Q Who was the head of the sales to Sears department in 1969?

"A I don't recall, sir.

t4/3 pm

"Q Well, who was head in 1970?

"A That's ahard question to answer.

"Q I can't give you any commitment to ask only easy questions, Mr. Steeb.

"A I understand that. It is more involved than just a name. That's what I am driving at.

"Q Well, please answer the question as best you can.

"A As I understand it, wehave a man within Whirlpool Corporation who has Sears sales responsibilities.

"The extent of those responsibilities and the people reporting to him in that responsibility, I am not certain of. That is because I don't follow all of these organizations.

"Q Now, you give me this answer in terms of a question which I put to you about 1970. Are you saying that you do not know who that man was in 1970?

"A No. I know who the man was in 1970.

"Q Well, who was he?

"A Robert Upton.

"Q What was Robert Upton's title within the Whirlpool organization?

"A I don't know, sir.

"Q Do youknow whether Robert Upton was an officer

mmbr 2 "Steeb

of the Whirlpool Corporation?

"A Yes, sir.

"Q Well, do you know what title he had at any time? You say he was an officer. What officership did he hold?

"A He was a Vice President of Whirlpool Corporation."

* * *

mmbr 3 "Steeb

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"Q Do you know anything at all about the reasons why the Oreck contract was not extended or renewed past that date?

"A No, sir.

"Q Nothing whatsoever?

"A No, sir.

"Q You were not consulted concerning that matter?

"A No, sir.

"Q You did not participate in any meeting within

mmbr 4 "Steeb

the Whirlpool organization in which the matter of the extension of the Oreck Corporation's contract was considered?

"A No, sir.

"Q Who was your immediate superior during 1971?

"A Jack Sparks.

"Q What was his title in the company at that time?

"A Group Vice President of Marketing.

"Q Who would you say was the person within the Whirlpool organization in 1971 who had the most direct contact with the Oreck Corporation in connection with its sale of Whirlpool-made vacuum cleaners?

"A John Payne."

Page 111:

"Q Now, do you know whether or not at the time when the Oreck distribtuion agreement came to an end, that is to say, the end of 1971, Whirlpool had an inventory of vacuum cleaners which had been manufactured for possible sale to Oreck?

"A Yes, sir.

"Q Do you have any idea, in approximate figures, of course, as to the size of this inventory in Whirlpool, as it existed at the end of 1971?

"A Yes. Approximately twenty-five to thirty thousand units, as I recall."

mmbr 5 "Steeb

Page 113:

"Q Have you any way of giving us the total value of the inventory as it was described by Mr. Payne at the end of December, 1971?

"A It would have to be an approximation. I can approximate it for you --

"Q Could you?

"A (Continuing) -- based on the approximate billing prices, as I recall them.

"Q Yes.

"A I would say in the area of $900,000 would be my guess, based on that 30,000 at roughly, $30 a unit type thing."

Page 118:

"Q Now, here you had $960,000 worth of inventory, more or less. You had a potential purchaser, did you not, in Oreck? He wanted it. That is so?

"A As I understand it,yes.

"Q You couldhave sold it to him cash on delivery, couldn't you, without prejudicing any moneys that he might be owing you?

"A I dont recall that those were the terms discussed.

"Q You could have said to him, 'O.K., Oreck,

mmbr 6 "Steeb

we'll sell it to you cash on the barrelhead, for cash'?

"A WE could have, yes, sir.

"Q Why didn't you do that?

"A Because of the statement I made earlier.

"Q Because he owed you other money?

"A Yes, sir.

"Q But you weren't going to be prejudiced in respect of that if you insisted on cash on the line, were you?

"A We did not insist on cash on the line.

"Q But you didn't do it, did you? You didn't offer him the merchandise for cash on delivery?

"A That is correct."

Page 120:

"Q Do you know to whom you sold it?

"A Yes, sir.

"Q Who was that?

"A We sold the uprights to the WEstern Auto Company --

"Q Yes.

"A (Continuing) -- and we sold the attachments, if you will, to the Mastercraft Corporation, as I recall.

* * *

mmbr 12 "Steeb

* * *

"Q Was there any meeting that you can recall taking place in 1971 in which the management considered the matter of the possible extension of the distribution contact with Oreck Corporation?

"A I can't comment. I don't know.

"Q Do you remember anything about that?

"A No, sir."

Dropping down a couple of lines:

"Q Who best would know about it in your company, if such a meeting took place?

"A A management meeting?

"Q Yes.

"A I would assume Mr. Sparks would.

"Q How about Mr. Payne?

"A I would say no. We knew -- I knew definitely at the end of 1970 that the agreement as written, et cetera, would expire of its terms.

"Q Address your attention to the next to the last

mmbr 13 "Steeb

paragafph of the Sparks letter of June 21.

"A Yes, sir.

"Q 'The decision of management remains unchanged.'

"A Yes.

"Q Now, the decision of management to which you refer was the decision embodied in the termination provision of the contract which had been entered into in 1968, is that right?

"A That is as I understand it, yes.

"Q And that decision is reflected by the language of the contract which makes it expire on December 31, 1971, is that correct?

"A By its term --

"Q Is that what you are saying?

"A By iterms terms it would expire, yes.

"Q Now, you say here, 'The decision of management remains unchanged.'

"A Yes.

"Q That means some subsequent action to the putting of the language into the contract of 1968, doesn't it?

"A I don't know.

"Q Somebody said, 'We're not going to change'. Isn't that right?

"A Well, I --

mmbr 14 "Steeb 770

"Q Sparks said in this letter, 'The decision of management remains unchaged', so that is true, isn't it? That's what is said here, isn't that true?

"A Yes, sir.

(Continued on next page.)

T5 pm jws "Steeb 771

"Q That means, does it not, that management considered the question as to whether the agreement should expire on December 31st, 1971, and decided that it should in fact so expire, not to change its mind about it, isn't that what that sentence means?

"A That is what it sounds like to me, sir, but I was told --

"Q Isn't that what it means to you?

"A Yes, but as I indicated a few minutes ago, I was aware at the end of 1970 that the management decision had been made and I notified Mr. Payne accordingly.

"Q Now you are talking about a management decision which was a decision other than putting it into the contract, isn't that right?

"A Well, yes.

"Q Somebody some place sometime in 1970 considered the question of whether we shouldn't change our mind and decided not to --

"A Well --

"Q -- isn't that right?

"A I can't comment to that.

"Q Well, that is what you are saying, isn't it?

"A Yes. I would assume that is true.

* * *

"Q Now that decision, if I understood your answer a moment ago, was communicated by you Mr. Payne in 1970, is that right?

"A Yes, at the end of 1970.

"Q In December 1970, is that right?

"A Something like that.

"Q What did Payne say about all this?

"A I really don't recall what he said.

"Q Didn't he urge you to have management change its mind and continue this relationship with Oreck?

"A I can't recall. He possibly could have.

"Q You say that he possibly could have. Do you know?

"A Knowing the man I can't specifically recall. It could well havehappened.

"Q You say 'Knowing the man.' What do you mean by that?

"A Well, John is one of these tyoes of individuals that you know about. It was his account for a number of years and obviously with respect to a decision of that nature, he would obviously look for, you know, a way to continue.

"Q He thought they were doing a good job, didn't he?

"A I think he did. They were doing a nice job, no question about that.

"Q No question that they were doing a nice job?

"A Yes.

"Q Is that your opinion as well as Payne's?

"A Yes."

MR. AGEE: Page 204:

"Q That was quite a score they made in L971 in units?

"A Substantial volume, yes, sir.

"Q 1970 was a good year, too, wasn't it?

"A I don't recall the number specifically. Yes, it was fine."

* * *

* * *

MR. AGEE: The deposition of Jack D. Sparks, August 2, 1973, as to which there was a reserve ruling, page 342:

"Q Do you know whether or not Oreck was not really competing with Sears when he was selling his vacuum cleaners in 1966, April?

"A Sir, if you are going to sell vacuum cleaners you are going to compete with Sears and Hoover and 20 other guys.

* * *

MR. AGEE: At the end of yesterday's session we were in the deposition of John Steeb, taken on September 23, 1974, page 215:

"Q This is September, 1970. He ends it by saying;

ms2 "Steeb 791

"'I sincerely appreciate your help and the cooperation of St. Paul in making this what appears to be an outstanding year in Whirlpool vacuum cleaners.'

"A And we thanked him for that.

"Q You thanked him by saying, 'Your agreement is at an end on December 31st, 1971, we don't need any more of your outstanding efforts or your large sales', is that the sense of what happened?

"A No, sir; that is not the sense.

"Q What did you do? You didn't sell him anything after December 31, 1971, did you?

"A That is correct, sir.

"Q You sold them to Western Auto? That was a good distributor, wasn't it?

"A No.

* * *

"Q Do you know what the price was at which you sold uprights to Western Auto?

"A Approximately, yes, sir.

ms3 "Steeb 792

"Q I beg your pardon?

"A Approximately. I can't go to the penny.

"Q Of course. What was that price?

"A Approximately $15."

2

* * *

"Q Do you know what you had been selling those same machines to Oreck for?

"A Again, approximately. Would you like me to comment on that?

"Q No. I would like to know approximately what it was.

"A Yes. That is what I am saying. Do you want me to answer?

"Q Yes.

"A The CVR-2000, in the area of $28 or $29."

MR. AGEE: Thomas Smith, of Sears Roebuck, deposition September 5, 1974, page 9:

"Q These catalogs, are these the type which are sent to the public generally?

"A Mor distributed to Sears customers.

"Q When you say Sears customers, don't you mean the public generally?

"A It's an odd thing that to get a Sears catalog you have to already have made purchases and be a customer in general.

"Q It's not available to the hoi polloi?

"A Catalogs are rather expensive, and the purchase is available to them without them having a catalog, since a lot of our business is done through our stores, through catalog order offices. So we qualify them.

"Q If you have made a purchase, you are eligible, is that it?

"A Two purchases in the previous six months will get a general catalog.

"Q Will that put you automatically on the mailing list?

"A Yes.

"Q The catalog will be sent to you whether you request it or not, is that what you mean?

"A Yes.

"Q Does this reflect some fairly recent change in Sears' distribution policy?

"A I would say that was pretty much the rule

25 years ago. There always has been a qualification of people."

THE COURT: May the record show that this is examination by Mr. Malcolm Hoffmann.

MR. AGEE: I am sorry.

THE COURT: It should show that.

MR. AGEE: Page 11, line 14:

"Q Was catalog sales a separate division of some sort of the Sears Roebuck Company?

"A The responsibilities in each merchandise department are divided, separate retail and mail order catalog.

"Q Does that division generally reflect itself in separate people in charge of retail and mail order business within the different departments?

"A Yes, sir."

* * *

* * *

"Q Do you have anything to do with the procurement of Whirlpool vacuum cleaners for sale by Simpson Sears?

"A Yes, sir.

"Q What is your function in respect to that?

"A Simpson Sears has a buyer with whom I work in coordinating our efforgs.

"Q What is the name of the buyer presently?

"A Len Pikkov, P-i-k-k-o-v.

"Q Where is he centered?

"A Toronto.

"Q How long has he had that function?

"A Nine years, I'm sure of.

"Q That is to say from 1974 back to 1965?

"A He was in that function when I came onto this job, yes, sir.

"Q Would you by any chance know the name of Mr. Pikkov's predecessor in the function?

"A No, sir.

"Q When you say you coordinate your purchases with Simpson Sears, do you mean that in the ordering that you have described earlier in your testimony today you include units for distribution to Simpson Sears of

Canada?

"A No, sir.

"Q What do you mean when you use the word 'coordinate'?

"A Planning of a line, method of selling, merchandising. They have an opportunity to purchase essentially the same items that we will be developing and producing, once they are put into production.

"Q Can we come at these one by one?

"In connection with planning of a line, what do you do conjunctively with Mr. Pikkov? What do you do coordinately with him?

"A Mr. Pikkov will sit in oour planning sessions or will visit us and we will bring him up to date on our future plans so thathe can see if the same plan would fit into his plans and the same merchandise into his plans.

"Q Planning of a line, does that concept include what the vacuum cleaner should be like?

"A Yes, sir.

"Q Would you be consulting with Mr. Pikkov concerning improvements that you might ask Whirlpool to make on a particular model during the coming year?

"A Yes, sir.

ms "Smith 800

"Q What else? Give us some more examples.

"A From the market research that we had determined the desires of the American public, changing or improving the product to include those features which the customer desired or needed, changing the design or the material to take advantage of technological developments in production, using a different material that could be -- constitute a cost savings, or do the job better.

"Filling more adequately price points where we know the market is doing business and where we are deficient.

"Q In the last part of your answer, filling more adequately price points where we know the market would be deficient, what do you mean by price points? I am not quite sure I understand that.

"Q You can divide a vacuum cleaner line into the per cent of national sales that come at $29, $30, $49 up to 369, and you can draft that and you create a bell curve so that you know where the majority of the purc hases are coming and how important each segment is, and where the sales are coming for each part of the entire spectrum of selling price.

"Q In your conversations with Mr. Pikkov concerning

ms "Smith 801

this matter, would you be considering the connection of Canadian price points as well as domestic American price points?

"A Yes, sir.

"Q In filling the line more adequately in Canada, what interest would Sears Roebuck in the United States have?

"A We are a minority stockholder, have an interest in the welfare of Simpson Sears as such.

"Q When you say a minority stockholder, do you know what the extent of that minority interest is?

"A I believe it's about 48 per cent.

"Q Do you know who holds the 52 per cent?

"A Simpson Company.

"Q Is that of London?

"A No, of Canada.

"Q In relationship with the officers of Simpson Sears of Canada, are there any Sears Roebuck American people among those officers?

"A The president of Simpson Sears is usually a Sears trained man who goes up from the States."

Dropping down to line 22 on page 85:

"Q Coming at this more generally, did I understand your testimony to be that the president of Simpson Sears

ms "Smith 802

is someone who has in the past been trained in Sears Roebuck, United States?

"A Yes, sir.

"Q That is generally true of the presidents of Simpson Sears, is that your testimony?

"A Yes, sir.

"Q So far as you know, would that have been true going back, say, to 1963?

"A When Simpson Sears was first founded in -- 26 years ago, quite a few executives from the States went up there. And gradually, as Canadians were trained, they have come back or withdrawn until I believe today the president is the only American, as they refer to us in Canada, in any large -- in any executive position."

Page 95:

"Q What is the general feeling, that Sears Roebuck, United States is the teacher and Sears, Canada the student?

"A In general, Sears is the teacher and yet I think our people could learn by going up there, because as in so many things the young are very much more aggressive in developing things that the oldsters forgot to use."

The continuation of the depositon of Thomas L. Smith of Sears by Mr. Hoffmann on September 6, 1974,

ms "Smith 803

beginning at page 226:

"Q Yesterday I asked you about negotiations with Whirlpool concerning the price at which Whirlpool sold machines to Sears. I would like to go back to that line for just a moment.

"Was there a periodic pricing meeting in which Whirlpool and Sears would bargain as to the price at which the machine would be sold to Sears?

"A Yes, sir.

"Q How often did such meetings take place?

"A Every three months.

"Q On behalf of Sears, the bargaining was done primarily by you, isn't that right?

"A Yes, sir.

"Q Sometimes assisted by people on your staff, is that your testimony?

"A Yes, sir.

"Q On behalf of Whirlpool in recent years, it was primarily Clarence Williams?

"A Clarence Williams.

"Q And his successor?

"A His predecessor.

"Q Burkinshaw?

"A George Wardeberg, his predecessor, Ray Whitman.

ms "Smith 804

"Q The present person whose name I have such difficulty with?

"A Ken Burkinshaw.

"Q He also bargained with you concerning price, is that right?

"A Yes, sir.

"Q Have there been occasions in which Sears has said to Whirlpool, 'If you don't meet the price we want, we'll take our business elsewhere'?

"A Yes, sir.

"Q Can you tell us when that happened?

"A That would happen on many occasions.

"Q It has happened on many occasions?

"A Not put exactly the way you did of meeting the price, but more, 'If the product is not competitive in price, we will have to buy elsewhere.'

"Q By competitive,you meant competitive with what other suppliers would charge you? Is that what you mean?

"A Competitive so that we could price it and be competitive in the marketplace with the profit we would be looking for."

Page 240, line 11:

"Q And no reports from marketing people or others

ms "Smith 805

about Oreck mail order literature or letters?

"A I saw literature, mail order, direct mail literature of Oreck's.

"Q Do you remember when that happened?

"A Probably around 1970, 1971, somewhere in there."

Page 267:

"Q Mr. Smith, if -- and I say if on a hypothetical basis -- the Oreck Company had sold 100,000 units of uprights made by Whirlpool using Sears tools, it would follow as a matter of simple arithmetic that there would be $75,000 in tool royalties or rental charges, is that right?

"A Yes, sir.

"Q Is it possible upon analysis of these monthly reports, and annual or semi-annual summations or compilations of those reports that were made, that such a big item as that would escape your attention?

"A Had it been $75,000, it would not have escaped it.

"Q If it were only 50,000 units, it would then have been $37,500. Would that have escaped your attention?

"A No, sir, I don't believe it would have.

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MR. AGEE: Next page, 269, line 24:

"Q Now, the situation is in mid-1971 that you are informed that the Whirlpool production line is goin to have to produce more units for Sears in order to take up the slack caused by the cancellation of Oreck, is that what you are saying?

"A That would be one cure for it, yes, sir.

"Q Was that why you were saddened by the event?

"A Yes, sir.

"Q That production line was a production line for the making of various vacuum deaners which were being sold under the name and style of Kenmore, isn't that right?

"A Yes, sir.

"Q Then does it not follow also that the same production lines that you were talking about were also being used to produce vacuum cleaners which prior to the termination of the sales agreement were being sold by Oreck? Is that also true?

"A Yes, sir."

Page 272, line 14:

"Q If those expenses are high for Whirlpool, then the expected effect, is it not, that Whirlpool will try to raise its price to Sears, is that right, for selling fewer units than it might otherwise sell, if Oreck were around?

wp2 "Smith

"A For any given reason. If production goes down, the cost goes up.

"Q Is that cost necessarily passed onto the purchaser?

"A Yes, sir.

"Q Did it happen to you when Oreck left?

"A No, because we at that time entered into a more aggressive campaign of selling ourselves.

"Q You sold more vacuum cleaners?

"A Yes, sir.

"Q After the Oreck sales contract came to a termination?

"A We went on the Olympics with the power mate. We finally convinced our management that they should embark on national advertising and television, and that affected our sales.

"Q About when did this national advertising and the Olympics and so forth come about? What time?

"A We started the campaign -- we tested advertising in the fall of 1970, began newspaper advertising -- magazine advertising in 1971, and had a full-blown television campaign for the Olympics in 1972.

"Q Was there a marked increase in the number of units sold by Sears after 1971 in 1972?

wp3 "Smith

"A Yes, sir. "

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MR. AGEE: The deposition continues on September 13, 1974, page 339, your Honor, line 19, again taken by Mr. Hoffmann:

"Q Do you know for how long a time Sears has been selling vacuum cleaners by mail order?

"A I believe there was a vacuum cleaner shown in the 1908 catalogue.

"Q Has that process been going on ever since 1908?

"A Yes, sir.

"Q Do you know whether Whirlpool at any time ever attempted to stop Sears from selling Whirlpool-made vacuum cleaners through their mail order catalogue?

"A Not to my knowledge.

"Q It would be an extraordinary thing if it happened?

"A It would be very odd to say the least."

MR. AGEE: Page 358, line 19:

"Q But when there is some specific business arrangement,as in the case of Whirlpool, you do do that, or not necessarily using the words I use, you go in and give advice as to manufacturing cost, isn't that so?

"A Yes, sir.

"Q Is that because you buy in large quantities from

certain sources of supply that are prepared to have you express your views as to their manufacturing operation?

"A No, sir.

"Q It's because of some business relationship, isn't that right?

"A No, sir.

"Q That is what you said before.

"A Let's define business relationship.

"Q Yes. Please do that.

"A With the proper conduct of a business, proper placing of orders, proper manufacturing sequence, timing, shipping, you can make the business more profitable or less profitable, by changing the specifications on a product, you can make the products more salable or less salable. To change the specifications on a product leads you into very often the equipment to be used in manufacturing in the plant and the amount of engineering cost that will be assumed to make those changes.

"So, making the business a more profitable one for all concerned entails all these things.

"Q What interest does Sears have in making the business of its supplier more profitable?

"A It is axiomatic at Sears that if our sources don't make a decent profit, we won't have sources very

long."

MR. AGEE: Dropping down to line 15:

"Q So you say that your interest goes beyond buying at a low price, is that right?

"A Yes, sir."

Page 375, line 18:

"Q Do you recall, Mr. Smith, in your testimony the other day, you said that in three of these price and costing sessions which were taking place since 1965, Mr. Button, the executive vice-president for sales, joined the group. Do you remember that?

"A No, sir, I do not.

"Q Is what I just said a fact?

"A No, sir, it is not.

"Q In what way is it wrong?

"A Mr. Button has never attended one of our costing sessions. I indicated that Mr. Button had reviewed the line of merchandise with us and the status of our business.

"Q Did he say he came to three sessions since '65?

"A I don't recall it was three.

"Q Do you think it might have been more?

"A No, sir. Less,if anything.

"Q Do you think it might have been as few as one?

"A I'm sure of one.

wp6 "Smith

"Q Do you think there may have been two?

"A There may have been two.

"Q Is it right to say that he came to one or two meetings but not three?

"A I am uncertain, sir.

"Q Now, in respect to the one you are sure of, what group was this that you are talking about?

"A Mr. Button and his staff and my immediate superior.

"Q Who was?

"A At that time, Mr. Daunauer.

"Q What was his title?

"A He was at that time national merchandise manager.

"Q When did this meeting take place?

"A That would have been in 1971.

"Q What was the general subject matter that was being considered with Mr. Button?

"A Mr. Button periodically meets with buyers to review their entire line of merchandise and be updated on their history and their plans for the future.

"Q This happened in relation to vacuum cleaners at that meeting?

"A Yes, sir.

"Q Anybody else present that you can recall?

wp7 "Smith

"A (No response.)

"Q Were any representatives of Whirlpool present?

"A Mr. Upton from Whirlpool was esent for part of the meeting.

"Q Do you remember how long a part?

"A Perhaps half of it.

"Q Do you remember how long the meeting lasted?

"A About 9 o'clock in the morning till about 3 o'clock in the afternoon.

"Q Approximately six hours?

"A Yes, sir.

"Q Do you remember where the meeting took place?

"A In St. Paul, Minnesota.

"Q At whose offices?

"A At the engineering conference room.

"Q Of Whirlpool?

"A Yes, sir.

"Q You were there for three hours at a meeting among Sears officials without any Whirlpool representative there at all on the Whirlpool premises?

"A Yes, sir.

"Q A conference room given over to you fellows?

"A Yes, sir.

"Q For three hours, there was Upton present?

wp8 "Smith

"A Yes, sir.

"Q During the time when Mr. Upton was present, if you can recall, what was the subject matter being discussed?

"A It really wasn't a discussion. It was a presentation by myself of the history of the lines, the progress we had made in sales, and what constituted our line of merchandise and what plans we had for future products.

"Q Did those plans for future products which you set forth include plans extended beyond December 31, 1971?

"A Yes, sir."

* * *

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MR. AGEE: I have one further reading from John Payne as to which you reserved decision and as to which I lost my place.

July 9, 1974, page 138, line 2:

"Q Do you know of any price" --

This is John D. Payne, deposition taken by Mr. Hoffmann on July 9, 1974. I am just reading fr m a passage on which his Honor has reserved decision and will now allow us to read.

"Q Do you know of any price factor otherthan the difference between the Sears and the Oreck price which might have been the subject of 5?

"A Yes.

"Q What would that be?

"A David's early products were very delux machines and they were fully featured and they included either an electric attachment or straight suction tools and they were high price top-of-the-line merchandise.

wp "Payne 820

"The entire market at this point in time was descending down through various price levels and was becoming very price competitive.

"Q That price competition to which you speak include competition between Sears and Oreck, did it not?

"A Yes."

* * *

wp "Payne - "Sparks 821

MR. TUROFF: This is the deposition of John Payne, question by Mr. Hoffmann:

"Q Affirmatively, what did you understand were your duties as product manager? What is included within the concept of product management in relation to vacuum cleaners?

"A I was responsible for the production, inventory, shipment, scheduling, customer service areas relative to price, design, esthetics, quality and service. I was not responsible for price and policy."

We would like now to read from the deposition of Jack D. Sparks, taken on September 11, 1973. We will commence on page 385 at line 6. Again it is very short and I will read it right here.

This is referring again, I think counsel will agree, to 1968, deposition of Mr. Sparks, question by Mr. Hoffmann.

MR. HOFFMANN: 385?

MR. TUROFF: 385, line 6, question by Mr. Hoffmann to Mr. Sparks:

"Q That was not a reason for the termination, is that right?

"A No, sir.

"Q Would you tell us now what the reasons were?

wp "Sparks 822

"A As I have previously stated, the reason that I gave Mr. Oreck at that meeting, which was the reason, was that his, the failure of the Oreck Corporation, to establish the type of distribution that we had agreed upon made it in our minds futile to go forward.

"Q Could you break down these failures for us into specific things? What were the failures?

"A The failure was that a distribution system, a distribution system of a one-step type to the major accounts was not creative.

"Q I know you spoke briefly of this last meeting, but what do you mean by one step?

"A One step would be from the factory to the Oreck Corporation to the major accounts.

"Q Was Oreck to your knowledge deficient in the sense that it used more than one step in selling to major accounts?

"A No, he was deficient in that he did not create the system. He created another system.

"Q Is it your statement then that he failed, Oreck Corporation failed prior to '68 to sell to major accounts?

"A No, sir. My statement is that in the beginning he did so to major accounts, but then from '65 on the emphasis was switched from major accounts to commercial-

wp "Sparks 823

type distribution.

I would like now to read from the deposition of Jack D. Sparks taken on May 22, 1974, at page 210.

May I proceed?

MR. HOFFMANN: Just a moment.

MR. TUROFF: Page 210, line 16, again Mr. Sparks is being questioned by Mr. Hoffmann:

"Q Did you ever hear, not directly but in the course of discharging your business duties at Whirlpool, that Sears objected to Oreck, objected to Oreck being in the vacuum cleaner business handling Whirlpool products?

"A No, sir.

"Q You never heard that?

"A No, sir."

* * *

* * *

"Q Now, sir, do you know whether or not the Oreck Corporation wanted to buy that approximately $960,000 worth of inventory?

"A I seem to recall that John Payne had mentioned that, yes.

"Q Payne had mentioned it to you?

"A Yes.

"Q Do you know any reason why the inventory was not sold to Oreck?

"A Yes, sir.

"Q What was that?

"A The reason was that the Oreck Corporation at that point in time when this happened owed the Whirlpool Corporation approximately $220,000. They hadn't paid for those goods so why go out and sell some other goods."

* * *

"Q The first sentence of the second paragraph reads" --

And here they are referring to Plaintiff's Exhibit 102 in evidence --

"'All of the vacuum cleaners that you requested and we agreed to provide are to be manufactured, shipped and invoiced within the guidelines established by the Whirlpool Credit Department not later than December 31, 1971.'

"A Yes, sir.

"Q Do you know anything about that?

"A In a very broad sense.

"Q Well, do you know whether or not Oreck complied with the guidelines established by the Whirlpool Credit Department?

"A No, they did not.

"Q How do you know that?

"A Because the credit line was at such a point that the Credit Department indicated that no more shipments would be released. That is what caused the inventory to remain at the division at the end of the year."

I am just about finished, your Honor.

Starting on page 219, the last line:

"Q Did you negotiate the deal with Western Auto

yourself?

"A No, sir.

"Q Do you know who in the company did?

"A John Payne.

"Q You were not prepared to sell this inventory to anyone, is that right?

"A For a period of time, that is correct.

"Q What do you mean by 'for a period of time'?

"A Well, there was no effort made on the part of my department to go out and seek the customer for this product for a period of time.

"Q Was there a reason for that?

"A Well, yes. The reason was that, as we all know, there was a bill in the amount of $220,000 owed and the Legal Department had a hold on the product. There was always the possibility, and this is again is my belief, that had the money been paid there might have been a settlement made. This again is as I see it."

* * *

* * *

"Q And no reports from marketing people or others about Oreck mail order literature or letters?

"A I saw literatue, mail order, direct mail literature of Oreck's.

ms2 "Smith 830

"Q Do you remember when that happened?

"A Probably around 1970, 1971, somewhere in there.

"Q Do you remember the circumstances under which you saw it?

"A As I recall, someone in our organization had received it at home and sent it to me through the company mail.

"Q Did it occasion any action by you?

"A No.

"Q Did you talk to anybody from Whirlpool about it?

"A No, sir.

"Q Did you have any meetings of staff concerning it?

"A No, sir.

"Q Did you express any objection to being confronted by Oreck mail order competition in relation to vacuum cleaners which at the very least, I suppose, we may agree looked much like Sears vacuums?

"A Since we had agreed tothe tooling use, I would not have been in a position to --

"Q I ask you now to search your memory, not your excellent powers of reasoning. What happened?

"A I did not."

Page 270, line 22:

"Q You didn't feel you might sell more machines if there was no Oreck around?

"A No, sir."

Page 273, line 20:

"Q And yet it was with a sad heart that you received the information that Oreck's sales arrangements would be at an end. That is your testimony?

"A I'm saddened by anything that would increase my costs.

"Q It ultimately increased your profits, did it not, because you sold more units in 1972?

"A I don't see a connection between that and the Oreck demise."

* * *

* * *

"Q Do you know any reason why the inventory was not sold to Oreck?

A Yes, sir.

"Q What was that?

"A The reason was that the Oreck Corporation at that point in time, when this happened, owed the Whirlpool Corporation approximately $220,000.

"They hadn't paid for those goods, so why go out and sell some other goods?

"Q Now, are you quite clear as to when this $220,000 obligated existed?

"A Clear as to the time?

"Q As to the time when it existed.

"A As I recall, at year-ed in 1971.

"Q Do you know whether it existed in October, 1971?

"A I don't know, sir.

"Q You don't know one way or the other?

"A No, sir.

"Q If I put it to you that they were current in October, would you know whether that was a true statement or not?

"A No, I would not, sir.

"Q How about November?

"A I do not know, sir.

"Q You don't know one way or the other?

"A I do not know one way or the other.

"Q How about December 15, 1971? Do you know whether it was true then?

"A I don't recall.

"Q But you have a clear recollection that it was true as of December 31st, 1971. Why is that? Why

are you so clear about that?

"A Because I recall that is the amount of money that Oreck Corporation owed Whirlpool.

"Q On a final accounting, is that right?

"A Yes.

"Q When you ended it up?

"A Yes, as I recall."

* * *

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M A R S H A L L O R E C K , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOFFMANN:

Q Mr. Oreck, where do you live?

A New Orleans.

Q Are you employed?

A I am.

Q Where are you employed?

A The Oreck Corporation.

Q Where is that?

A 100 Plantation Road, New Orleans, Louisiana.

Q How long have you been employed with Oreck Corporation?

A Since 1964.

Q Would you please sketch for us what your employment relationship to Oreck has been since you first joined that company?

A I started in 1964 and I was primarily involved in organizing a new business, helping get the office started, setting up procedures, getting involved with the products, the vacuum cleaners, setting up procedures regarding parts and warranties and other general working

with the new company.

Q Did your initial employment have any title that went with it?

A No, it did not.

Q Did there come a time when you were given some defined title or function in the company?

A Yes.

Q When was that?

A 1966.

Q What was that function or title?

A General manager.

Q What were your duties as general manager for the Oreck Corporation?

A I was in charge of all the day-to-day functions of the business; I was in charge of all the purchases; I was in charge of factory relations with Whirlpool and the technical end of getting the cleaners and handling the repairs and customer servicing.

* * *

Q Well, sir, in your functions at Oreck were they directly related with the sale of the Whirlpool vacuum cleaners?

A Only in part. I did do some selling, but I was primarily involved in the mechancis of the operation of the company as far as purchasing material s, shipping, and the handling of various details that go with running the business.

Q In respect of this mecharical aspect you just described, when did you first become involved in this branch of the business?

A Almost right from the beginning I was involved in the technical mechanial end of the vacuum cleaners, in handling various procedures and setting Up working agreements with Whirlpool, our handling of buying the product and working with them as to various details on the product.

* * *

* * *

Q Sir, did you deal with the engineers of Whirlpool in respect of the matter of the design of the Whirlpool vacuum cleaners sold to Oreck Corporation?

A Yes, sir.

Q And, sir, did you also deal with Oreck customers?

A Yes, sir.

Q Tell us your function in regard to dealing with the customers?

A I dealt with the Oreck customers in that I would when they purchased a product, I would go to the various customers or stores and find out what their experience was with the product, how it was holding up, if there were any problems, any way that we could assist in making it better, and I then would relay this information to

St. Paul. They asked me on many occasions to keep them fully aware of what was happening with the product and various details, if there was a problem what that was, and how they could overcome it.

Q Did you have any dealings with your customers in respect of the matter of repairs and servicing of the vacuum cleaner?

A Yes, I did. I set up service stations and worked with various service agents that we had, and in doing so, to simplify the matter, I wrote a service manual. The unit is simple and it is easy to repair, and the biggest problem with any small appliance is that sometimes a person not knowing how to repair it, the minor problems, I felt by publishing in a small service manual it would assist our customers in the repairs of this cleaner and in this manual I listed the parts by number and description so it would simplify the whole servicing process.

Q What was done with this service manual?

A I submitted it to Whirlpool, their engineers read it over, read it through, and okayed it, printed it for me, and included it in every cleaner they manufactured for us.

Q Did these suggestions you speak of, passed back

to Whirlpool, ever result in any changes in the design of the vacuum cleaner?

A Yes, they did.

Q Could you give us examples of that?

A We had a problem that strings and dirt was collecting at the end of one of the revolving brush bearings and it was causing the brush to bind and belts to burn out and motors to burn out, so we worked on a little sleeve that would fit on the end of that bearing that would eliminate that problem; we worked on life tests on the belt, because the original belt we had would not hold up; we designed a new belt; we had a vibration problem where the handle would fall off the unit, the screw become loose; we found a way of securing it better.

We had a dust problem where dirt was clogging the motor and causing a premature burn-cut. We designed a whole new system of protecting the motor from this dust. We worked out a procedure whereby we put in an overload cut-off switch in order to protect the motor in case of a blockage on the revolving brush that would cause the brush to stop and in most cases would cause the motor to burn out, but in this case the overload switch would stop it and would prevent serious damage to the

machine.

There were many small improvements we made as we went along, many too numerous even to mention now.

Q When you say "we made," you mean you suggested and Whirlpool adopted? Is that what you mean?

A Yes. I would go to St. Paul with my suggestions, and in many cases Mr. Payne would ask me to send them ahead before I came to their meetings so he could have the proper people available at the meetings.

I provided my customers, one Industrial Chemical Company in St. Paul, I authorized them to return the machines they had purchased from us for light commercial use to Whirlpool so they could look the machines over, see where the problems were, and try to improve the machine by various studies after they found the way in which the machine was defective and the way it had worn out. They had this advantage, and that I provided them with all kinds of materials so they could effect improvement.

Q Sir, these machines of which you speak, when Whirlpool first began to sell to Oreck, what types did they fall in? What broad categories?

A At the beginning?

Q At the beginning of your franchise?

A We had canisters and uprights and power attach-

ments.

Q Are examples of those here in the courtroom?

A Yes, sir.

Q Were there different types of uprights manufactured by Whirlpool and sold through Oreck during the period of the first agreement starting in 1963?

A Basically one upright. We had variations of it which showed improvements as you went along, but basically we had just one upright.

Q Is that this one I have in my hand, which is Exhibit No. 5?

A Yes, sir.

Q You say basically you had one upright? Is this something that has no basic difference?

A The only thing is when we started we had a machine that was brown in color and maybe a few of the aesthetics were somewhat different, but the machine itself, as you see it now was basically the machine we started with; the nozzle and assembly is the same; the majority of the parts you see were all identical at the beginning as they are now, but they do have the improvements that we were able to add in the latter part of 1969 and 1970, when we really got into big production with it.

Q Did these machines as they have been made by the improvements added change their number? I note here that this is the Whirlpool 2000 high speed upright. Were there other serial numbers such as that used?

A Yes, there were. Sometimes they represented a new machine that had new changes in it; other times it was just a model change each year, to maybe give it a little more color, a little more emphasis, we would change the model number.

We started with the LV-55 and then we went to the LV-55-1, and then we went to the CVR-500, 600, 600-1, and then the CVR-1000, CVR-2000, and we had a CVR-3000.

* * *

Q You may resume the witness chair.

Prior to 1967 what methods were used by Oreck in the distribution of vacuum cleaners?

A Prior to 1967 we dealt primarily with department stores.

Q Did the distribution methods change at or about that time?

A Yes, they did.

Q Tell us what the new method was?

A The new method was through janitorial supply dealers and also through direct mail.

(Plaintiff's Exhibit 110 was marked for identification.)

xx

(Continued on next page.)

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Q Mr. Oreck, I show you Plaintiff's Exhibit 110 and ask you if you can tell us what it is?

A Yes, this is a meeting report from August 28, 1967, in St. Paul, Minnesota, the Whirlpool factory.

MR. HOFFMANN: I ask that this from the files of the defendant be received in evidence.

MR. TUROFF: No objection.

THE COURT: Received.

xx

(Plaintiff's Exhibit 110 received in evidence.)

Q Sir, this meeting, which is referred to in Exhibit 110, was this a meeting which had been requested by you?

A In part it was a meeting that we mutually agreed upon with Whirlpool.

MR. HOFFMANN: And this document, from which I read in part, is entitled "Agenda and Comments From Marshall Oreck Meeting of August 28, 1967."

And I will read from Item G, which is on page 3. I will read the last item. It describes what is to be included on the LV 651 model.

"Our load switch? Parcel Post package? Any other details?"

Now, sir, one of the items mentioned there is

the Parcel Post package. Was that matter discussed at that meeting?

A Yes, it was.

Q What is this reference in G to the LV 651 model. That was not one of the ones that you listed before.

A That appeared to be a typographical error on Whirlpool's part.

Q What is the closest model number that you know to LV 651?

A I believe they meant LV 55-1.

Q What kind of a machine was that?

A That was an upright machine very similar to the CVR-2000.

Q Now, sir, did you, representing Oreck, advance at this meeting some position about Parcel Post packaging?

A Yes, I did.

Q And what was that?

* * *

A We had a package in 1968 that was too long --

too large in size to be shipped via Parcel Post. The Parcel Post requirement was a package with a length and width to be no longer than 84 inches. Ours was over that.

And also in the United Parcel Service they require that if a package exceeds 84 inches, then -- excuse me, it should have been 84 inches is what the Parcel Post requirement is. If a package exceeds 84 inches at United Parcel Service you pay a penalty which is double the rate, in this case a 25-pound rate.

What I asked Whirlpool to do is that because we were getting into more of the individual shipping of single packages, that we no longer went via the motor trade route for shipping, that I would like them to design a Parcel Post size package so that I could ship it via Parcel Post or via United Parcel without having to pay a penalty.

Q Are you talking now about the package as it existed at the moment of this meeting, August 28, 1967?

A Yes, sir.

Q And what position, if any, was advanced by the Whirlpool representatives present concerning that matter?

A They felt that there was actually no problem at all in doing this in that when we originally started with them on this particular product in 1964 they did in fact have a carton that did meet the requirement of what I was

looking for and they felt there would be no difficulty in giving it to me again.

* * *

xx (Plaintiff's Exhibit 111 marked for identification.)

Q Sir, I show you a document entitled "To John Payne from Oreck Corporation." It has been marked 111 for identification.

And then on the face of it appears "Signed, Marshall Oreck," and there also appears what is called "Reply to: R.E. Deaux, Director of Engineering."

Do you know who Mr. Deaux is?

A Yes, sir.

Q Who is he?

A He is the Director of Engineering at the Whirlpool Benton Harbor Division.

Q I should ask, who was he as of 7/25/1969. Is your testimony the same?

A Yes, sir.

Q And John D. Payne, do you know who he was?

A He was the product manager in charge of our accounts.

MR. HOFFMANN: Your Honor, I offer this document into evidence.

MR. TUROFF: No objection.

THE COURT: Received.

xx (Plaintiff's Exhibit 111 received in evidence.)

MR. HOFFMANN: Now, this message to John Payne from Oreck Corporation, signed Marshall Oreck, reads as follows: --

(Mr. Hoffmann read from Plaintiff's Exhibit 111 in evidence.)

Q Then there is a handwritten message at the very bottom of the document. Can you read that, Mr. Oreck? I have trouble.

A "Unless handle is shipped unassembled it is physically impossible to comply with this request.

Cleaner without package is too large."

Q Can you make out whose initials or name is there?

A Yes, I believe that is Dixie Deaux's initial there.

Q Now, what came of this?

A John Payne -- I called John Payne shortly after I received this around the latter part of July, 1969, and told him that I would accept it with the knocked-down handle or taken apart, unassembled, as he put it, and that I needed this carton as soon as possible because the costs were so high for us in handling the larger carton.

Q And what was it that Whirlpool did about it?

A John called me back around the 1st of August, 1969. He said that he would submit my request. They knew how to do it, but they had to get approval from their superiors about this and he would be back to me on it.

Q Is there anything much in disassembling the handle to this vacuum cleaner?

A No, there is not.

Q Could you, perhaps, do it for us here?

A Certainly.

MR. HOFFMANN: If you please, your Honor, it will take just a second.

A All it required was just looping this through right here and packing the machine in this fashion. It would fit in the carton just like this and it makes the carton shorter and more compact. They put a little packing around it. That is all that was required.

Then when the customer received it, all they had to do was do like that. They could take a screwdriver or even a dime that would fit the slot.

I am just turning it. And that is all that was entailed.

(Plaintiff's Exhibit 113 marked for identification.)

MR. HOFFMANN: Your Honor, I have in my hand Plaintiff's Exhibit 113, Payne to McDaniel, packaging engineer, under date December 4, 1969, coming from Whirlpool. And I offer it in evidence.

* * *

(Plaintiff's Exhibit 113 received in evidence.)

MR.HOFFMANN: Plaintiff's Exhibit 113 in evidence reads as follows: --

(Mr. Hoffmann read from Plaintiff's Exhibit 113 in evidence.)

BY MR. HOFFMANN:

Q When did you first see this document?

A In preparation for this case.

* * *

Q Of the size that you had requested?

A We discussed the matter several times and late in '69, when this was sent, John felt that we were going to get that carton, and he said it was just a matter of working it into the production schedule of our next runs and getting their carton people together and he felt that we would have this carton soon.

Q Can you locate that conversation in time?

A It was in the latter -- late in December of 1969.

Q After the date on Plaintiff's Exhibit 113, which is December 4, 1969?

A Yes, sir.

(Plaintiff's Exhibit 114 marked for identification.)

Q Plaintiff's Exhibit 114 appears to be a copy of a letter from you to John Payne, September 10, 1970. Did you send this letter to John Payne?

A Yes, sir.

* * *

THE COURT: I have permitted a certain amount of inquiry here. It seems to me we are going to enormous lengths here. How are you going to connect this up with the alleged conspiracy?

MR. HOFFMANN: Your Honor, this is another example of where the sales people, Payne and so on, requested Whirlpool to take that which would have been useful to Oreck and helped them in the conduct of its mail order business.

Along with everything else in this case, it

supports the inference of conspiracy.

THE COURT: How much longer are you going to be on this subject?

MR. HOFFMANN: Only a few minutes, your Honor.

THE COURT: On the representation you are not going to be more than three or four minutes more, I am going to overrule the objection. I don't see that there is going to be any great connection.

* * *

xx (Plaintiff's Exhibit 114 received in evidence.)

* * *

MR. HOFFMANN: Reading 114 in part, John Payne from Marshall Oreck, September 10, 1970: --

(Mr. Hoffmann read from Plaintiff's Exhibit 114 in evidence.)

BY MR. HOFFMANN:

Q What response, if any, did you obtain from Mr.

Payne to the request embodied in this letter, Exhibit 114?

A I called John Payne late in September, having not heard from him about this, and I pleaded with him. I said, "I don't understand why we had this problem since 1969, why can I not have the cartons?"

He said, "I submitted the cartons several times to Corporate and they advised me that they had absolutely no intention of providing me with the Parcel Post carton."

I said, "Why? What difference does it make what size carton?"

He said, "They are not interested in providing you with a carton and it's in your best interest leaving this matter alone. It's sensitive with Corporate and do not make any changes, leave this matter alone."

Q About when did the conversation you just described take place?

A To the best of my recollection, it was late in September, 1970.

xx (Plaintiff's Exhibit 119 marked for identification.)

Q By the way, Mr. Oreck, do you know whether Sears distributed vacuum cleaners by mail?

A Yes, I do.

Q How do you know that?

A I was told by John Payne that they did and I have seen them ship them.

* * *

* * *

Q Was there any conversation additional concerning this matter with Mr. Payne or others at Whirlpool, in addition to those you described earlier in your testimony?

A There was with Mr. Payne in 1970 when I kept pressing him for a reason why it took so long to get the carton, which is so simple.

Q Place these conversations as best you can in time?

When did it happen?

A In the fall of 1970.

Q Where did it take place?

A On the telephone.

Q Tell us as best you can what passed between you? What you said to him and what he said to you?

A I asked him what was the problem? Why was it so difficult to get such a simple thing? And again I told him how important it was to me to have this and the savings, and he said that he had submitted it many times to corporate and they continually refused his request to give us this carton. I said, "I don't understand why they do this?"

And he said, "You know, they are not interested in your pursuing the direct mail market, and this would assist you."

(Plaintiff's Exhibit 115 was marked for identification.)

xx

* * *

* * *

(Plaintiff's Exhibit 115 was received in evidence.)

xx MR. HOFFMANN: Reading from Exhibit 115, it is dated September 22, 1970, from John D. Payne to Mr. John Martin, subject CVR-2000 package, and reading the third paragraph:

"Please note but for three inches of current oversize carton we would satisfy this United Parcel UPS requirement and if there were any way to shrink the current carton without knocking down the product I would be much in favor of this approach.

"At any rate, we are required to either

shrink or knock down the product in order to satisfy this new request.

"Please advise the proper costing."

(Plaintiff's Exhibit 116 was marked for identification.)

xx Q Mr. Oreck, I show you 116. Can you tell us what this is?

A Yes, this is a base cost charge for the proposed parcel post package.

MR. HOFFMANN: Your Honor, this ties to 115 from which I just read, and I offer this in evidence as coming from the files.

* * *

(Plaintiff's Exhibit 116 was received in evidence.)

xx Q Can you read the handwritten first page of the three pages of the exhibit?

A "Base cost change from current pack to a proposed pack suitable for parcel post shipment Whirlpool lightweight upright vacuum cleaner (Oreck) Model CVR-2000. If the proposed pack is adopted for production the following base cost increase would be necessary."

Then there are some abbreciations, but the final base cost is 13355 per unit. No accrual cost required.

MR. HOFFMANN: Your Honor, I just wish to comment. The witness has read .3355. I take it we can all agree that is 33-1/2 cents, approximately.

THE COURT: Right.

(Plaintiff's Exhibit 118 was marked for identification.)

xx MR. HOFFMANN: 118 is described as Floor Care Products Engineering Agenda, project review for Mr. Marshall Oreck, dated February 12, 1971.

It is offered in evidence.

* * *

(Plaintiff's Exhibit 118 was received in evidence.)

xx MR. HOFFMANN: Plaintiff's Exhibit 118 in evidence reads in part:

Floor Care Product Engineering Agenda, and it is dated February 12, 1971.

Items To Be Reviewed:

Present: 1. Package for Parcel Post (Completed).

Oreck v Whirlpool

Tk2 xx Bl p.m.

(In open court.)

(Plaintiff's Exhibit 123 marked for Identification.)

Q Mr. Oreck, I show you Plaintiff's Exhibit 123 for Identification, a communication from Payne to David Oreck and the note reads that there is a copy marked for you on the first page.

Do you recall having seen this communication at or about the time it is dated?

A Yes, sir.

MR. HOFFMANN: I propose, your Honor, to ask the witness some questions concerning the text of the communication. First I offer it in evidence.

* * *

xx

(Plaintiff's Exhibit 123 received in Evidence.)

MR. HOFFMANN: Your Honor, may I please let the witness refer to the abbreviated 123 since my questions are only addressed to the covering letter on the first page of the exhibit.

Q Mr. Oreck, I address your attention to this first page of Plaintiff's Exhibit 123. You notice the subject matter is "Development of extra sales" and it is from Mr. Payne to David Oreck.

(Mr. Hoffmann read from Plaintiff's Exhibit 123 in Evidence.)

Q Sir, I ask you, was Oreck invited by Whirlpool to participate in this revised employee purchase policy?

A Yes, sir.

Q Under what circumstances was that?

A In early December, 1969, John Payne called me and told me that he had a plan whereby Whirlpool employees could buy the Whirlpool vacuum cleaner, that it had many, many requests from Whirlpool employees to buy the vacuum cleaner, and that he wondered if we were interested in entering into a plan so that a Whirlpool employee could get this. And he asked that we -- if it were possible for us to set up dealer stores in the areas where there are Whirlpool factories so that the people could buy them and then

they would bring their cleaner -- the receipt for the purcha of the cleaner to their -- to Whirlpool and they would give them a 10 percent discount.

Q And did you respond to this?

A I did.

Q And what did you say to Mr.Payne?

A I had my salesmen go out and go to each one of the areas where there was a Whirlpool factory and set up a dealer store that could handle this program and then I notified Mr. Payne that I had done this and that we were ready to start the program.

Q And did you proceed in the program?

A No, we did not.

Q Why was that, sir?

A Mr. Payne told me - I believe it was January of 1970 - that when his superiors saw the plan they vetoed it, said that they were irate about it. They said we were not to sell Whirlpool vacuum cleaners to Whirlpool employees but only the vacuum cleaners that were to be available under the particular plan.

I asked him who that was and he said, "We only have one other, Sears-Roebuck Company."

* * *

Q When did this conversation take place?

A To the best of my recollection, I believe it was mid-January, 1970.

Q Under what circumstances was it? By meeting, by phone, or how?

A John Payne phoned me in Stamford, Connecticut.

xx (Plaintiff's Exhibit 124 marked for Identification.)

* * *

Q I show you 124 for Identification and I ask you, Mr. Oreck, is this a communication from you to John Payne with reference to this matter of selling Whirlpool vacuum cleaners to Whirlpool employees?

A Yes, sir.

Q Is this the indication that you refer to in your testimony that Oreck is willing?

A Yes, sir.

B2 MR. HOFFMANN: I offer it in evidence, your Honor.

* * *

* * *

(Plaintiff's Exhibit 124 received in Evidence.)

(Mr. Hoffmann read from Plaintiff's Exhibit 124 in Evidence.)

* * *

Q With reference to this employees' discount program, was there any time, was there ever a time at which there was offered to Whirlpool employees a 10 percent discount in buying vacuum cleaners from Oreck?

A No, sir.

* * *

* * *

Q Sir, I would like to ask this question: In respect of the conversation with Mr. Payne in the course of which, in accordance with your earlier testimony, participation in the program was denied by Whirlpool, is there anything more that you would like to tell the Court and jury than what you said before about the conversation?

* * *

A Well, I spoke to -- John Payne called me in late January, 1970. He told me that he was very disappointed that he could not --

MR. TUROFF: Your Honor, you are restricting the witness to anything additional.

THE COURT: Well, I am going to have to deal with it in this fashion in the interest of time.

Go ahead. What did he say to you at that time?

A That he was terribly disappointed that we could not participate in the 10 percent employees' discount plan, he had been vetoed by his superiors. However, he said they were irate about the idea of it; that he was not

to make this offer; that only Sears vacuum cleaners were to be sold under the 10 percent plan.

And that was the end of it.

* * *

* * *

Q I read toyou from Plaintiff's Exhibit 79 in

Evidence, which is a letter from S.E.Sweet to David Oreck attaching the general release and executed copies of the amended agreement under date August 9, 1968.

"With reference to paragraph 2 in the agreement it is understood that from time to time you may find it necessa to request we consider making either of the two products described without the Whirlpool name."

What were those two products again, Mr. Marshall Oreck

A The CVR-2000 and the AP-18 or the CAP-33 which came later.

Q "Such a request will, of course, be given proper consideration, but sole determination as to whether we build them or not remains with Whirlpool. Also, any and all costs in connection with the name-change will be borne by you.

"With all good wishes" -- and so forth.

Did you have any occasion to discuss with representativ of the Whirlpool Whirlpool's making vacuum cleaners under private label for the Oreck Corporation?

A Yes, sir.

* * *

* * *

Q You say you had a conversation with Mr. Payne. When did it take place?

A The first one took place in 1967 and I had another on the same particular account in 1968.

Q Can you separate the two conversations in point of what their substance was?

A Yes, sir.

* * *

Q Can you place it more closely in time than simply the year 1967?

A I believe it was June of '67 and I called John Payne and told him that I had a very, very good increase from Airway Sanitizer in Toledo, Ohio; that they were very interested in having the Ap-18 power attachment and power

label --

MR. TUROFF: Your Honor, I object to the witness throwing things out.

B3 THE COURT: This is what he said to Mr. Payne, I gather. Go ahead.

A And I said -- I gave him the specifications as to how they wanted it. They wanted it in kind of an aqua green color, and so on. And they were interested as an opener in 5, 10 and 15 thousand units and they would like a price. And I gave them all the specifications and he said he would be very interested in this kind of business and it would be a marvelous way of increasing our business and he was very enthusiastic about it.

Q You say there was a second conversation concerning the subject matter -- parden me, have you completed your first conversation?

A Yes.

Q When did the second conversation take place?

A I believe it was either January or February of 1968. And I asked him if he had been able to work up any quotations and he said that he had not, but that he was working on it and that he would expect to have something for me very shortly after that phone call.

Q And what next happened in connection with this

matter?

A He never gave me the quotations. He told me that they just --

MR. TUROFF: Just a moment. If we are going to have a conversation, let's have a foundation.

THE COURT: Yes. Sustained.

Q Are you talking now of a third conversation with Mr. Payne concerning private labels?

A Yes, sir.

Q When did that happen?

A To the best of my recollection, two or so weeks after the second conversation.

Q And what passed between you then?

A I told him the customer was pressing me for the price and that I had to have it in order -- so that I could quote him and he said that it takes time to do all the figuring, and so on, and that it would be coming.

* * *

Q When you say shortly thereafter you were informed, how were you informed?

A By phone all.

Q And from whom?

A John Payne.

Q And again in time, can you tell us approximately when this telephone conversation took place?

A I believe it was a week or two weeks after the conversation he said he would try to expedite the pricing of that.

(Continued on next page.)

Q What passed between you and this conversation?

A At that time he said that corporate had decided not to quote on this and not to make a private label for us.

Q Did he give you any reason or say anything more than what you have just told us?

A No, just that he was disappointed.

* * *

Q As to the specific customers you mentioned who wanted private label, did the Whirlpool Corporation sell them vacuum cleaners during the life of the franchise, that is to say, prior to the end of the franchise on December 31, 1971?

MR. TUROFF: I'm going to object.

Q Did the Oreck Corporation sell those customers prior to December 31, 1971?

A We did one, sir. It was not a private label, but they were willing to buy from us without the private label.

Q As to the others?

A We asked Whirlpool for quotations --

MR. TUROFF: I am going to object if we are going to get back into asking about quotations.

Q Were you able to sell the others without private labels?

A No, sir.

MR. TUROFF: I object.

THE COURT: That is much too general. That is the reason I am striking that out.

MR. HOFFMANN: I will take the words "Were you able to sell" out of the question.

Q Did you sell to other customers prior to the

end of your franchise, the ones who asked for private label?

A Yes, we did, some, but we sold them our own cleaner, the Whirlpool cleaner.

* * *

Q Mr. Oreck, you will recall that in testifying yesterday you mentioned some companies which had requested that you provide for them vacuum cleaners for private label?

A Did you receive such a request for a company called Rexair of Cadillac, Michigan?

A Yes, sir.

* * *

Q Do you have the pending question in mind?

A Sir?

Q Do you have the pending question in mind?

A No.

THE COURT: Did Rexair ask you about making a private label vacuum cleaner for them?

THE WITNESS: Yes, sir.

Q About when did that happen?

A January, 1968.

Q And in what form did the request take?

A I met with them in Cadillac, Michigan, and at that particular time they were purchasing our AP-18 from us and they weretaking it in our regular form and they were painting over the name and changing some of the esthetics of the machine and then reselling it to their customers and they asked me if at that time.

MR. TUROFF: We object to any conversation. It is purely hearsay.

Q You were requested, were you not, to produce a private label machine for Rexair?

A Yes, sir.

Q What did you do about that request?

A I called John Payne in January, 1968, and told him of Rexair's interest and that they were a volume vacuum cleaner manufacturer and they could use a lot of

AP-18s and this would be an excellent way to increase sales of the AP-18 attachment.

Q In that telephone conversation what took place? What passed between you and Mr. Payne?

A I told him they wanted the machine without the hose and without the tools, but just the bare machine itself, that they would even accept it unpainted because they would take it and paint it themselves if this was a big cost savings; otherwise, they would like the machine delivered with just the Whirlpool identifications deleted from it, and Mr. Payne told me that he would submit my request and let me know what the cost would be in either one of those two forms.

Q How did Rexair's request finally turn out? What happened to it?

A In July of 1968 Mr. Payne told me that he could not at this time give me the production in the AP-18 and he turned down my request.

Q Was there any more to it?

A Yes, sir. In February of 1969 the CAP-33 model came out. I showed this to Rexair. They said they would like that machine private label. I again called Mr. Payne and I said I would like the CAP private label without hose, without tools, that they wanted the bare unit, they

would take it painted, unpainted, or just without the Whirlpool printing on the face. And he said he would submit that to Corporate for pricing and approval and he would be back to me. And I again told him at that particular time that Rexair was selling 500 units a month --

MR. TUROFF: I am going to object to all this business about Rexair.

Q What was the final determination? Was there any?

A In February of 1968 -- excuse me -- February of 1971, I was in St. Paul. I urged on Mr. Payne the importance of getting a price on this, that they were willing to give me a very large order. He said to me, "I will submit this and I will let you know."

Q Did he let you know?

A Yes.

Q When did that take place?

A In September, 1971.

* * *

* * *

Q Please tell us about this. You are talking about a conversation that took place in September, 1971, with Mr. Payne?

A Yes, in mid-September, 1971, Mr. Payne called me. We discussed Rexair buying one large bulk sale of CAP-33

just without the Whirlpool name on it. He said that Corporate had turned him down, and I said, "I don't understand. You have the capacity to make them; you have all these machines; why can't I have them?" He said, "Because another customer objected."

I said, "What other customer?"

He said, "Another vacuum cleaner customer; they are not interested in having another competitor in the vacuum cleaner business."

* * *

* * *

MR. TUROFF: Your Honor, with the utmost reluctance and sadness, after talking with Chicago, the defendant Whirlpool moves for a mistrial in this case.

THE COURT: On what ground?

MR. TUROFF: That the testimony of Mr. Marshall Oreck under the circumstances of what transpired last evening, which transpired in the presence of Mr. Marshall Oreck, and in reopening a line of testimony which was covered yesterday as to conversations concerning private label, albeit not with regard to that specific customer, but the area of conversations concerning --

THE COURT: Mr. Oreck, will you step from the room again, please?

(Witness temporarily excused.)

THE COURT: -- what you are saying is that under

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the circumstances that was given it was perjurious?

MR. TUROFF: In part, true.

THE COURT: A perjurious afterthought?

MR. TUROFF: Yes. I say this with respect, because I know the Court did not mean it because of the conversation we had yesterday off the record, which, I think, triggered it in this witness's mind.

* * *

* * *

Q Now, Mr. Oreck, you testified this morning concerning a conversation you had in September, 1971, with John Payne concerning private label vacuum cleaners. Do you recall that?

A Yes, sir.

Q I believe it was in connection with the Rexair Company, is that correct?

A Yes.

Q Do you recall that conversation in your mind now?

A Yes.

Q And it was in September 1971 that you talked to Mr. Payne on this subject?

A To the best of my recollection, yes.

Q And he gave the answer that you indicated on the stand, is that correcg?

A That's right.

Q Now, Mr. Oreck, do you remember that your deposition was taken in this case on February 15, 1973?

A Yes.

Q And it was taken over in a law office on 61 Broadway, wan't it?

A I believe so.

Q And I was there, wasn't I?

A Yes.

Q And I believe a Mr. Malcolm Bell was there, isn't that correct?

A Yes, sir.

Q Mr. Malcolm Bell at that time was associated with Mr. Hoffmann, was he not?

A Yes, sir.

Q And Mr. Bell acted as your attorney. Is that not also correct?

A Yes.

Q And there was a court reporter present at that time, wasn't there?

A Yes, sir.

Q And you were given an oath to tell the truth, were you not?

A Yes, sir.

Q And that was the same oath that the Clerk of the Court gave you before you got on this witness stand to begin your testimony, wasn't it?

A Yes, sir.

Q And I asked you questions much the same as you are being asked here, isn't that true?

A Yes.

Q And you gave answers in much the same fashion in answer to my questions here, isn't that correct?

A Yes.

Q After the deposition was written up it was submitted to you to read the transcript, was it not?

A Yes, sir.

Q And you read the transcript and you signed it and swore to it as true on June 14, 1976, didn't you?

A Yes, sir.

Q Now, during the course of that examination on February 15, 1973, on page -- beginning at page 319 you were questioned about conversations you had with John Payne concerning private label vacuum cleaners, were you not?

A I don't have a copy of that.

Q Well, I'm just asking you if you remember that, those questions were asked.

MR. HOFFMANN: Are you asking him whether he remembers the page, too?

MR. TUROFF: No.

Q You remember I asked you questions about whether you had conversations with Mr. Payne about making private label vacuum cleaners. You remember that, don't you?

A Yes, sir.

Q And you went through those conversations, did you not?

A Yes, sir.

Q And you described them to the best of your ability, did you not?

A Yes, sir.

Q And you described one or two conversations and then you described on page 322 a conversation in early 1971 and then I asked you, "Was there a" -- page 323 --

"Was there a further conversation between yourself and John Payne that you can recall with reference to this paragraph" -- this paragraph referring to an answer in interrogatories, talking about private labels.

And your answer to that was:

"Not that I can recall."

Do you remember that?

A No, I don't.

Q You don't remember it at all. As a matter of fact, isn't it a fact, Mr. Oreck, that in your deposition you never testified to a conversation with John Payne in September 1971 concerning private label vacuum cleaners?

MR. HOFFMANN: Your Honor, I insist that you look at the page here. The conversation is reported right here in this deposition, starting on page 320.

MR. TUROFF: I suggest you read down to page 322, your Honor.

(Pause.)

THE COURT: Objection overruled.

MR. TUROFF: Would you read the question and answer, Mr. Reporter?

(Read.)

A Possibly my time of reference might have been

off. I had the conversation with him.

Q Oh, you remember that now, but you didn't remember that in 1973?

A Yes, sir.

Q Your memory is better now in June of 1976 than it was in February of 1973 concerning this conversation?

A It was only in a point of reference in time. It was within months that I had this conversation with him.

Q I see. It wasn't important enough to remember the date, but you remember the substance of the conversation, isn't that correct?

A I do remember the substance, yes.

Q I see. You didn't testify to it yesterday, did you?

A I didn't have the opportunity, sir.

* * *

* * *

Q Mr. Marshall Oreck, do you recall having been examined on February 15, 1973 in the offices of Strcock, Stroock & Lavan here in New York City by Michael Turoff?

A Yes, sir.

Q I would like to read to you from your testimony given then and starting at page 318, line 15.

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"Q Now, Mr. Oreck, referring to Oreck Corporation's answers to interrogatories filed in this cause, and in particular in answers to Interrogatories 21 and 22 appearing on page 31 of the answer and in particular the second paragraph beginning 'On numerous occasions,' would you

state the first conversation between you and John Payne to which you refer?

"A I believe the first conversation had to do with private label business.

"Q When was it? Let's start with that.

"A 1969.

"Q Would that be in November, 1969?

"A I don't recall whether the one I have in mind was November, 1969.

"Q Why don't you read it? Take your time. Read the paragraph.

"A It was November, 1969, yes, that was one.

"Q I want to cover the conversations to which you were referring in this paragraph to the answers to interrogatories."

And then my colleague Mr. Bell says at line 11:

"Let me read the paragraph to be sure the record will be more complete.

"On numerous occasions between November, 1969, and July, '71, John Payne" --

* * *

* * *

MR. HOFFMANN: "John Payne spoke to Marshall Oreck about other customers and our other vacuum account. Sears was Whirlpool's only other customer vacuum account.

"Q When was the first such conversation that you are referring to in that answer to the paragraph?

"A November, '69.

"Q Where did it occur?

"A On the telephone.

"Q Where were you?

"A Stamford.

"Q Was there anyone present with you at the time?

"A No.

"Q Or an extension?

"A No.

"Q And that was with John Payne?

"A Yes.

"Q What did you say to John Payne and what did John Payne say to you concerning our other customer or our other vacuum account?

"A It had to do, we were discussing the possibility of Whirlpool doing private label machines, our machine only on a private label for one of our customers."

* * *

* * *

MR. HOFFMANN: He said that Whirlpool could not do this and did not care to get into the private label business for us at that time.

"When I asked the reason why, he said, 'Our other vacuum cleaner account objected to that.'

"When I asked who that might be, he said, 'The other vacuum account.' He just repeated it.

"Q When was the next conversation with John Payne to which you were referring in the paragraph and the answer?

"A I don't recall the actual date. It happened again

in 1970. We went the same way again.

"Q Do you recall approximately when in 1970?

"A No, I don't.

"Q Was it in person or over the telephone?

"A Over the telephone.

"Q And I take it no one was with you?

"A No.

"Q Or on an extension?

"A No.

* * *

The matter which I have just read comes from the deposition, as I think I mentioned, taken on February 15, 1973, and it was with reference to an interrogatory answer which had been given to Whirlpool dated in 1972.

My colleague corrects me: January 10, 1973.

BY MR. HOFFMANN:

Q You have heard this testimony which you gave then read to you, sir. Do you know of any reason why you should change it now?

A No, sir.

Q Yesterday you on cross-examination had suggested to you that the Payne conversation was made up overnight. Is there any truth in that, sir?

A No, sir.

THE COURT: You mean the September, 1971, conversation you are talking about?

MR. HOFFMANN: The date having been given as September, '71.

Q Are you sure of the date of the conversation, sir, the one with Mr. Payne?

A Yes, sir.

Q And when was that?

A September, 1971.

Q When Oreck Corporation purchased vacuum cleaners from Whirlpool, Mr. Oreck, it bought them, did it not? It paid money for them and bought them for resale; isn't that what happened throughout the franchise?

A Yes, sir.

Q And you bought them outright, that is to say, they were delivered to you and you paid for them and you sold them on letters; isn't that what went on during the franchise?

A Yes, sir.

Q My colleague reminds me that yesterday on Mr. Turoff's examination he asked you about sales to Whirlpool employees. Did you have any regular practice or method for selling to Whirlpool employees?

A No.

Q Were some such sales in fact made?

A Yes, they were.

Q Do you remember the circumstances under which they were made?

A Yes.

Q Tell us about that, please.

A John Payne would call me and say that a certain Whirlpool employee would request that he be allowed to buy a Whirlpool vacuum cleaner and would I give him permission to sell it and at what price would he like me to sell it at.

Q Did this happen often?

A Not often, but occasionally.

Q And did John Payne buy one himself through you?

A I don't know personally that he did, but he did act as an agent for various other Whirlpool employees to purchase cleaners on occasion.

Q Did you sell one to Jack Sparks, for example?

A We gave one to Jack Sparks.

Q Plaintiff's Exhibit 124 which is in evidence is

a letter from you to John Payne under date January 8, 1970. And I read to you the third paragraph. This is coming from you to Mr. Payne:

"Talking about the Whirlpool employees, we would give them our special one-half price offer of 44.75. We would dropship each cleaner by United Parcel right to the employee's home, or anywhere else he wanted to ship."

Tell me, Mr. Oreck, did that ever happen?

A No, sir.

* * *

* * *

Q Now, at the time you had the conversation you testified to with Mr. Payne in September concerning the private label business, who owned the tools for the vacuum cleaners that you wanted to have made as private label?

A This was a CAP-33. I don't know who owned them

Q Sears owned some of the tools, didn't it?

A In the CAP-33 I don't know that to be a fact.

Q Sears owned the nozzle tool for the CVR-2000,

didn't it?

MR. HOFFMANN: Are you testifying or asking a question?

MR. TUROFF: I am asking the witness a question. This is cross-examination.

A Yes.

Q And the same nozzle was used on the CAP-33, wasn't it?

A Yes.

Q Now, how long does it take to make private labels?

A It depends on how many changes you want. In our case it was just a matter of deletion rather than a change. It's a deletion of the Whirlpool name.

Q But it is also a fact, is it not, Mr. Oreck, that when you make any change, even a change of name, the product must be resubmitted to Underwriters Laboratories for approval; isn't that true?

A I don't know that.

Q You don't know that one way or another?

A No, I don't.

Q And if a product has to be resubmitted to Underwriters Laboratories for approval, do you know how long it takes to get the approval?

A Yes.

Q How long is that?

A It can take anywhere from two weeks to six weeks.

Q In fact, it usually takes more than eight weeks, doesn't it?

A I don't know that to be a fact.

Q You don't know. You don't know one way or the other?

A I know that my personal experience has been in the area of 30 days, more or less.

Q You have to change the cartons, too, don't you, to put the machine in?

A No.

Q You mean the private label brand wants the Whirlpool name on the cartons?

A At that particular time they said they would take it in any carton, they would re-carton it themselves.

Q Did you have to change the construction of the carton?

A No.

Q I thought you said the customer wanted to buy the machine without the hoses and without the attachments?

A That is merely an insert. It had nothing to do with whether it has a carton -- tools or hose in it or not. That insert would have to support the cleaner.

Q Wouldn't the cleaner fall around inside the carton if they had no hose, no other attachments inside?

A No, it would not.

Q Wouldn't the instruction booklet have to be changed?

A No.

Q The instruction booklet had Oreck's name on it, didn't it?

A They made their own booklet.

Q So they didn't want to put a booklet in it?

A No, they weren't interested in that at all. They wanted the machine only without the Whirlpool name on it.

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H Y M A N B. R I T C H I N , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOFFMANN:

Q Where do you live, Dr. Ritchin?

A 1912 New York Avenue, Brooklyn, New York.

Q What is your profession?

A I am an economic consultant and I also teach economics. I am an adjunct professor in the economic and finance department of Baruch College of City University.

Q Have you held any other academic posts?

A I was a visiting professor of economic at Cornell University.

Q Are you a member of any professional associations or organizations?

A Yes, I am a member of the American Economic Association.

Q Will you trace briefly for us, Professor, your academic career?

A I received a BBA degree from the College of the City of New York, an MBA from New York University and a PhD majoring in business administration with a major in economics from New York University.

Q What is your employment background?

A I was a senior economist in the Antitrust Division of the United States Department of Justice from 1938 to 1974, and from 1974 to date I have been a private economics consultant.

Q In connection with this long service in the Department of Justice, did your functions include such matters as analysis of industries, appraisals of competition and monopoly?

A It did. It was part of my duties.

Q About how many industries would you say you studied?

A Over 200.

Q Coming back, sir, to your teaching, in what specialized areas have you been teaching?

A I have taught price theory and industrial organization.

Q Have you, Dr. Richin, in the course of your experience as an economist dealt with the question of ascertaining in advance lost profits that might be experienced by a company as a result of restraint of trade?

A I have.

Q Have you been retained as an expert witness for plaintiff Oreck Corporation?

A I have.

Q Tell us, sir, how are you paid? Does your fee have anything to do with the outcome of this litigation?

A No, it does not. I am being paid on an hourly basis.

Q In your experience as an economist, do you study the problems which face a corporation when it is breaking into an industry?

A Yes, I have. The problems are obstacles which a company faces when it tries to enter an industry which is commonly known in economics by the term "barriers to entry." Barriers to entry are an important factor to an economist in distinguishing whether a market is competitive or non-competitive.

Q Why is that so?

A Well, when there are barriers to entry it means that those companies already in the industry have an advantage in cost or price over those who try to enter. In other words, it means that when a company enters such an industry, he has to -- his costs are higher and he has to sell at a lower price. Therefore, it puts him at a competitive disadvantage.

Q Have you examined circumstances of Oreck's entry into the vacuum cleaner business?

A Yes, I have. I have examined the selected important documents and I have read the transcript of this case.

Q On the basis of your study, can you tell us what barriers, if any, to entry Oreck faced?

MR. TUROFF: I am going to object, your Honor. I don't think there is a proper foundation. The witness said he simply examined selected important documents. We have no idea --

MR. HOFFMANN: He also said he read the transcript, your Honor.

MR. TUROFF: I don't know what else he has seen and I don't know what the selected important documents are, if we are going to get an accurate opinion.

THE COURT: Come up here.

MR. HOFFMANN: I am relying on 704, your Honor.

(At the bench.)

THE COURT: How does this case deal with barriers to entry?

MR. TUROFF: It doesn't.

THE COURT: I think it deals with circumstances of exit.

MR. TUROFF: Sure, he got it --

MR. HOFFMANN: I didn't hear what you said, your

Honor.

THE COURT: I said, how did this case have to do with barriers to entry? It seems to me this case has to do with circumstances of exit.

MR. HOFFMANN: Your Honor, that is certainly a cute comment as to part of the case, but the other part of the case has to do with the entry of the Oreck Corporation into the mail order business. What we call the total character of the business changed starting in 1967 and on to the rest of the franchise they became a mail order company. Our damages and claims of damages are based upon the major premise that they are in the mail order business.

That being so, it is necessary for us to show what the difficulties to be overcome are in order to ascertain a reasonable, sensible base for projecting future profits.

MR. TUROFF: Your Honor, he got into the mail order business in '67.

THE COURT: It seems to me the only relevant [illegible] would be to see whether we can get competent testimony from Mr. Ritchin, who has experience, in the economic field without question, but to get to the question of what you anticipate future damages are --

MR. HOFFMANN: Your Honor, I wasn't going to use him for the purpose of damages, but to show the methods which are reasonable to be used in making damage projections and then use an economist who is going to be on the stand next to tell how those worked out.

THE COURT: Why should the jury have to give consideration to the problems of getting into a field? Concededly, your client got into it. What damages flow from that?

MR. HOFFMANN: They don't flow from that, but the fact they are barriers to entry affects the amount of the damages which we seek and it also --

THE COURT: How does it affect the amount of damage?

MR. HOFFMANN: Your Honor, that is what the testimony will show.

THE COURT: You tell me what you expect it to show.

MR. HOFFMANN: I expect to show that because vacuum cleaners are sold by established brand names it is necessary for Oreck Corporation, in order to overcome the circumstance that rest heavily in advertising, mail order advertising -- which in fact it did -- and this is to be expected, and Oreck is confronted with heavy durable goods

which he is trying to get the public to accept. And Mr. Ritchin's testimony will be confirmatory of that.

THE COURT: How do you tie that in with damages attributed to Whirlpool?

MR. HOFFMANN: Your Honor, we are going to first show what the past history is as a Whirlpool distributor in terms of units sold and in terms of converting those units sold into gross profits and then use reasonable projections as to the future.

THE COURT: Well, now, the first claim is one that they excluded Oreck from the market. It doesn't seem to me it is relevant to any question on that claim, the problem that Oreck may have had in the market.

MR. HOFFMANN: Your Honor, the relevance comes in terms of what methods are to be used in trying to come to a reasonable projection for profits.

Now, the illegal termination claim doesn't stop. It runs from the end of '71 to June 14, '76, which is the date of trial.

THE COURT: I don't see why the jury, which is going to have manifold problems to grapple with anyway, should have to try to decide where this evidence fits in your picture. The question of Mr. Ritchin, which I am perfectly clear about, as I recall was what are the

problems of entry into this field. Right now I don't see that has anything to do with any of the pleadings, with any damage issue.

If you establish by 1971 they were selling 75,000 units a year, what does Ritchin's testimony have to do with that?

MR. HOFFMANN: Your Honor, we are going to have testimony about durable 15-year expected life household goods have product differentiation, that is to say the householder doesn't go and answer an ad for a vacuum cleaner until somehow it has gotten reinforced in their minds that this is the thing to do. In doing that there has to be some of what the economists call production differentiation, that is to say the name has to become known as against competitive names.

THE COURT: All right. I think I now see. The argument is relevant. I will overrule the objection.

MR. TUROFF: May I be heard on it?

In the first place, I could hardly hear counsel. I don't know what his last answer was.

THE COURT: His last answer indicated you could take the position that until you had gotten your name sufficiently well established you don't have a base for determining what your future sales are going to be. He

was in the process of establishing them by the direct mailing. I can see that this arguably has the basis for what kind of sales might have flowed had the name been established.

MR. TUROFF: Except for one thing. Mr. Oreck has been prermitted to testify over my objection as to why his sales increased into 1971 and he said he found the right formula and they were doing everything right. I am sure you remember that testimony.

He also said that by that time there had been built up 250,000 satisfied customers who knew abut it and they were his best source of repeat business. He had been in this business by his own testimony since 1967 and established his name. His name continued on. He is still in the mail order business today and, as a matter of fact, he admitted that he is the world's largest seller of this type of vacuum cleaner.

Therefore, I think it is entirely inappropriate to have this kind of testimony. In fact, I think the strong argument can be made it is entirely inappropriate here to have an expert's testimony at all in view of the fact that he never got out of the market, stayed in the market and he is the biggest man in the industry today.

THE COURT: There are general statements as to

what are the difficulties of entering the market, of what are the breaking-in propositions in the market.

MR. TUROFF: He broke in in 1967.

THE COURT: I am going to overrule the objection.

MR. HOFFMANN: Thank you.

(Continued on next page.)

(In open court.)

A Yes, I found that the principal barrier to entry was product differentiation.

Q What do you mean by product differentiation?

A Product differentiation is the preference of the consumer for one product over another in a group of products which are similar and competitive for reasons other than price. For example, one person may prefer one brand of aspirin over another brand of aspirin even though the ingredients of the two aspirins are the same.

Q Are there different ways in which a product can be differentiated?

A There are four main ways of differentiating a product. A consumer may want to buy a product at a particular location because it is convenient to buy at that location.

A consumer may want to buy a product because he is satisfied with the service that is attached to that product. For example you may want to buy a General Motors product because it has a very good service organization.

A consumer may want to buy a product because there are physical differences. For example, you may have a rayon shirt or a cotton shirt. You may prefer

one over the other.

A person may prefer a product because of the advertising that is involved or the brand labeling or word of mouth sales promotion or different packagi Those are the four main ways of differentiating a product.

* * *

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Q Mr. Ritchin, in the course of your studies as an economist have you had occasion to study household products and durable goods?

A Yes, I have.

Q On how many occasions, sir?

A Yes, quite a number of them.

Q Now did your studies include the market forces that play in the distribution of products in those industries?

A It did.

Q Did your studies also include the vacuum cleaner?

A Did my previous studies?

Q In connection with this lawsuit did you make a study of that?

A Yes.

* * *

Q You just started to answer the question. The question was whether or not product differentiation is important as a barrier to entry in the vacuum cleaner market?

A It is important because of the nature of the product. Vacuum cleaner is a complex consumer durable. It is complex becasue when a buyer is in the market to buy a vacuum cleaner he is ignorant of the characteristics of the vacuum cleaner in order to make a rational choice among very many different vacuum cleaners. For example, he wants to know whether the vacuum cleaner cleans well or whether it cleans better than other vacuum cleaners. He wants to know whether there is ease of handling. He wants to know whether it operates efficiently as against other vacuum cleaners. And he wants to know whether there is a possibility of defects in the vacuum cleaner as compared to others. And what the service is involved in relation to the vacuum cleaner. Therefore he cannot -- that person cannot go in a store and buy based purely on observation as he can on some other products. He has to buy based upon use and experience. However, even though he may have used the vacuum cleaner before, a vacuum cleaner has a long life. It lasts, I think the testimony shows 15 years, so when the time comes for him to buy

the vacuum cleaner, his experience with the old vacuum cleaner no longer holds. He is totally ignorant of the characteristics of the new vacuum cleaner.

Therefore, he has to buy based upon established reputations of the product which are usually based upon cumulative advertising or word of mouth sales promotion.

Q When you say cumulative advertising, what do you mean by that?

A The repeated advertising that's over a period of years.

Q Have there been economic studies made on the importance of product differentiation in this kind of household goods?

A Yes, many, many studies have been made but the classic study was made by Professor --

MR. TUROFF: I object to testimony concerning a study by somebody else. It is clearly hearsay.

THE COURT: Yes, sustained.

MR. HOFFMANN: Your Honor, I offer it as foundation for an opinion from the witness and the very objection to foundation was made by my adversary just a moment ago. I thought it would be rather customary in interrogating an expert witness to set forth the materials on which he reaches an opinion.

THE COURT: If he is going to reach an opinion on the basis of someone else's studh rather than his own experience, I would think the objection is well taken.

MR. HOFFMANN: But an expert functions in context of not only his own experience but his knowledge of the industry and the economic world about him. And it is in that area that I was asking the question. I do not consider the question important.

THE COURT: Put your question again and let's see its exact limits, all right.

Q Are you familiar with economic studies concerning the matter of the importance of product differentiation as they may affect household goods such as vacuum cleaners?

A Yes, I am. There have been many studies in this field. The classic study was made --

MR. TUROFF: I am going to object, your Honor, if he is going to explain about the study that --

THE COURT: I do not see it is appropriate for Mr. Ritchin to tell us the contents of a classic study.

MR. HOFFMANN: I see no need to press it.

Your Honor, so long as the point is being argued, may I address your attention to --

THE COURT: What page are you looking at?

MR. HOFFMANN: I am looking at page 113, the bottom, Rule 703.

(Continued on next page.)

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THE COURT: That is exactly what I was saying.

MR. HOFFMANN: Your Honor, I --

THE COURT: To the extent he bases his opinion on various things including what he has gleaned from a study, that is one thing, but for him to make a statement what a study contains I find to be inadmissible. 703 does not contradict me in this regard, as I read it.

MR. HOFFMANN: I did not suggest for a moment that it was contradicting you. I thought it served to show that an expert could give his opinion primarily, of course, based on what his opinion is which is the product of what he is, it is the product of him as an expert, but also he could present data outside the Court and outside his own knowledge and perception, and to that extent the Rule 703 was a broadening of the prior rule about opinion evidence as it existed before and --

THE COURT: I do not disagree with that, but I think we ought to get a statement of opinion and then let's go to what the bases of it are, rather than have him tell us that a certain study contains certain information.

MR. HOFFMANN: I quite agree. Perhaps I gave it in inverted fashion.

BY MR. HOFFMANN:

Q Dr.Ritchin, can you tell us whether or not in

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your opinion advertising -- let me put it this way -- intensive advertising is essential in order to have the consumer make his product differentiation choice in favor of the product advertised?

MR. TUROFF: Your Honor, the question is leading and suggestive.

THE COURT: I sustain the objection. What effect does advertising have in this area? Let us go on that basis.

A As I indicated in my prior answer, when you have an unknown product, an unknown brand or an unknown image and the consumer cannot judge or cannot make a rational decision based upon observation and has to rely on established reputation, therefore, it follows from that that advertising is extremely important in convincing, in persuading the consumer to buy your product as against another product.

Q When Oreck entered the vacuum cleaner market, was its vacuum cleaner well-known?

A No, it was not, as I understand it --

MR. TUROFF: I object to that unless there is a foundation for it, your Honor.

MR. HOFFMANN: He testified how people knew --

THE COURT: I think that that's an assumed

and a hypothetical question, is it not?

MR. TUROFF: What point in time was he being asked?

MR. HOFFMANN: Your Honor, this witness has already testified that he read this record and this is his opinion based on the record itself, an opinion which 703 allows him to give. Certainly plenty of evidence was introduced as to the background of the Whirlpool vacuum cleaner. As my colleague reminds me, there are documents about this, too, as the situation existed when Whirlpool designated the Oreck Corporation as its franchisee.

THE COURT: This is the Whirlpool name we are talking about now, which is the name on the product. Am I correct about that?

MR. HOFFMANN: The Whirlpool name was first, your Honor. This is just a comment about the testimony, was first the name of RCA-Whirlpool. And then you will recall the RCA was dropped from the name and then it was known as a Whirlpool vacuum cleaner. Always when sold by Oreck bearing the Oreck label as well, and then, if your Honor please, when the franchise was terminated the vacuum cleaner now is sold solely under the name of Oreck.

THE COURT: Yes, but it is still a Whirlpool vacuum cleaner.

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MR. HOFFMANN: To the extent that the vacuum cleaners which came from Whirlpool were being sold, that is true. It was a Whirlpool vacuum cleaner.

THE COURT: I am going to sustain that objection. I do not think that there is sufficient in this r-cord to permit this witness to testify as to the currency of any name in 1963, which is what you are asking him to do as a fact matter.

BY MR. HOFFMANN:

Q How in your opinion can a new entry into a market such as this overcome existing barriers to entry such as the barriers you described earlier in your testimony?

MR. TUROFF: I object to the form of that question.

THE COURT: Overruled. Go ahead.

A It can do it in one of two ways or both. According to the classic textbook explanation, it can increase its --

MR.TUROFF: I object to an explanation of classic textbook method.

THE COURT: Ladies and gentlemen, we will take our mid-morning recess.

(The jury left the courtroom.)

THE COURT: How does this bear on any issue raised in the pleadings? This, it seems to me, is digging even deeper than the breaking into the field which I had some reservations about what was persuaded in your favor, Mr. Hoffmann.

MR. TUROFF: Before we start, may I ask that Mr. Ritchin step out in the hall?

THE COURT: All right, in order that your mind be unaffected by anything we say here --

MR. TUROFF: I am sure it won't be.

THE COURT: I am sure it won't be.

(The witness stepped out of the courtroom.)

MR. HOFFMANN: Your Honor, what I want the witness to show, and he will if I am permitted to question him, is that Oreck began to advertise heavily when he changed his marketing strategy, which had been rather unsuccessful, as the records of the company show, and then used this process of intensive advertising. This created a trend in his sales which could be noticed by examination of his records and the trend went not only to the end of the franchise, but it is a trend which went past 1971 into the future, and so helps to serve as a guide to computations of damages for loss of future earnings, and the matter has significance --

THE COURT: That is much narrower than what you asked, what you are telling me now is much narrower than what you asked the witness.

MR. HOFFMANN: I was asking a general question. As is so often my wont, letting the witness run his route downfield. But that is the purpose of my question, and the witness will talk, if permitted, about the market forces which created the rise in units near the end period of the franchise and --

THE COURT: Mr. Hoffmann, may I suggest to you the inquiry being within guidelines such as given what Mr. Oreck was doing, do you conclude that these sales figures are comparable with the type of marketing that he was doing and what is your expectation with reasonable certainty as to whether it would continue?

MR. HOFFMANN: Your Honor, I would certainly --

THE COURT: It seems to me beyond that nothing is really germane to our issues.

MR. HOFFMANN: Your Honor, I would have couched those questions in precisely that way before the Rule 703. 703, it seems to me, gives me the right to ask him affirmatively about his opinion concerning these matters without any hypothetical or anything of that sort. And 704 as well.

THE COURT: I know, but you still have to stay within the guidelines of the pleadings and the issues that are being litigated.

MR. HOFFMANN: I think I am doing that, your Honor.

THE COURT: What is why I asked this, because it seemed to me you were asking questions about entry into the field in 1963 that --

MR. HOFFMANN: Your Honor, I will start my questioning when the recess is over, if I may, with the '68 period, because the background before that is really not of any great moment in connection with --

MR. TUROFF: Your Honor, there is something else with regard to that. It seems to me that what he did in '68 to '71, especially with regard to advertising and such matters as that is irrelevant and it is irrelevant for this reason. The man enters into an agreement as Mr. Oreck did in August of 1968 which says the agreement will continue until December 31, 1971, at which time the agreement shall expire and you have gotten the agreement in evidence, and so he knows at that time when his agreement is going to come to an end, and then he goes out and engages in heavy advertising or whatever to promote the product. He clearly does so at his peril and he cannot

now come in and say, because in this period when I knew what the parameters of our agreement were, I went out and did a lot of advertising and now I built all this up and now I am damaged because you have done exactly what you said in writing you were going to do. And it seems to me that the whole line of inquiry on his projection in the future is therefore irrelevant and prejudicial. He cannot be damaged in the sense that they are talking about.

THE COURT: I will overrule that objection, Mr. Turoff, for this reason: It seems to me that if in '68 he puts in funds and the contract is terminated absent antitrust reasons, you will be absolutely a hundred per cent correct and there is no case then to go to the jury. On the other hand, if in '71 there is antitrust violation in connection with the termination and the jury were to find, it seems to me they are entitled to consider facts in 1968 going to what the damages are that flow from the wrongful termination as opposed to a lawful termination.

MR. TUROFF: I am not quite sure at what point you are talking of a wrongful termination.

THE COURT: In '71. If the termination in '71 were induced by reason of a violative agreement, then it seems to me the plaintiff is entitled to get into the subject of damages and if the plaintiff is entitled to

get into the subject of damages, you can arguably go back to '68 to begin to see how the damages build up.

MR. TUROFF: My argument is on the record. Perhaps it is a better argument made on motion for a directed verdict.

THE COURT: That may be. All right.

(Recess.)

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"Jury present.)

H Y M A N B. R I T C H I N, resumed.

BY MR. HOFFMANN:

Q Mr. Ritchin, I show you Plaintiff's Exhibit 106, which is in evidence in this case. This is a document you have seen before, is it not?

A I have, sir.

Q Sir, if you will look at it, you will note that it describes in the first column the total of all units which have been sold by Oreck Corporation, is that correct?

A That is correct.

Q Addressing yourself to that first c olumn which starts with the year 1967 with some 8384 units and then goes to 15,610 in '68, and so on. Do you have an explanation to afford as to this rise in sales?

MR. TUROFF: I object to that, your Honor.

THE COURT: Sustained. I do not think that question calls for expert testimony. We have had testimony from the president of the company on that, so I sustain the objection.

Q Well, sir, have you studied the marketing strategy used by this company during that period '68 to '71?

A I have, sir.

Q And what is it, sir, that you conclude from it?

A During the 1968-'71 period, the Oreck Corporation changed its marketing strategies. It adopted the policy of advertising heavily. It's advertising cost per unit of sale is exceedingly high. It changed the form of its advertising. It engaged in direct mail advertising and it also changed its marketing strategy in terms of the price that the product was sold. Before it sold a product whose price was above the average market price, whereas in this period it sold a product which sold for -- which was a popular-priced product.

Q This Exhibit 106 shows a rise from 8384 in '67 to 78,203 in '71. Is that rise described by economists as a trend?

A It is.

Q Can you say whether or not this trend, as demonstrated by that column on 106, continued 1971?

MR. TUROFF: I object to the form of that question.

THE COURT: Yes, sustained as to form.

Q Sir, have you studied the marketing done by the Oreck Corporation to pass the conclusion of its franchise on December 31, '71?

A Whether I have studied -- I am sorry, I do not understand --

Q Have you studied the marketing techniques used by Oreck Corporation as they went past the end of the franchise on December 31, '71, into the year of '72, for example?

A I haven't studied the marketing techniques used by Oreck post '71, but I have studied it prior to '71.

Q Can you from your studies tell us what the trend would be after the end of '71?

A Yes.

MR. TUROFF: I am going to object in view of the witness's last answer.

THE COURT: What kind of factors would go into the foundation to that answer?

MR. HOFFMANN: The witness's expertise in studying market patterns in many different industries. This industry as well.

THE COURT: On the assumption of what? If Oreck were to continue to market in the same way? That is the simple question I am asking.

Q Would you please answer what the Judge is really inquiring about? If you are to try to chart a trend past '71, on what assumptions would you deal if the trend was

one for future sales of vacuum cleaners by Oreck Corporation?

A That the same market --

MR. TUROFF: I am going to object --

THE COURT: Overruled.

A That the same market forces that prevailed in the period from 1968 to 1971 which brought about that steep rise in Oreck's sales would have continued in the post-1971 period and therefore I would have anticipated that the yales would have shown a sharp rise.

Q Why would you do that?

A Well, for various reasons. One, the Oreck Company was a very young company. It was really only four years in the direct mail business. It was certainly not an established company. Although its sales increased quite considerably, or the rate of increase increased considerably, its market share was extremely low. In 1971 I think Mr. Oreck testified that he had about 1 per cent of the market. Therefore, the rise was on a very small base. Also, the rate of growth was much larger than the rate of growth in the industry generally. Therefore, I would assume from that that Oreck was -- the Oreck Company was being successful in attracting customers to its brand and another reason I would say is that I would think that -- well, as

Mr. Oreck testified, he was going to increase his mailings from 10 million to 35 million --

MR. TUROFF: I object. I don't believe that's in the record anywhere.

MR. HOFFMANN: It is in the record.

THE COURT: I will accept that representation at this point.

MR. TUROFF: Your Honor, based on that kind of conclusion as to what the witness was going to do in the future? It seems to me that kind of a self-serving conclusion in the future I would have sent out X number of mailings?

THE COURT: I understand. The objection is over-ruled.

A That he was going to increase his mailings to 35 million, and if you apply the conversion rate which Mr. Oreck testified that existed in 1971 of 7.8 units per thousand mailings, then you can easily see that the trend in the sales would have sharply increased, and for these reasons I would say that the sales would have increased in the post-'71 period.

Q In light of that testimony and looking at Plaintiff's Exhibit 106, which describes the unit sale increases and the percentage of sales increases over

years, have you any way of equating that trend to figures which would be a reasonable application of economic theory?

A I would have anticipated that the sales would have increasedat a minimum rate of 42.6 per cent a year for 1972, for 1973 and for 1974, and then it would flatten out and the same sales volume would continue for '75 and for '76. I base this conclusion on the following factors: One, the 42.6 rate of growth was the lowest rate of growth that Oreck experienced during this period.

Also in the same year that Oreck experienced this rate of growth, the industry's rate of growth was at its lowest point during this period.

And also for the same reason that I just stated in my prior testimony for the increase in sales in the post-1971 period. Also assuming that the Oreck Company increased its sales -- its mailings by 50 per cent each year, which is a reasonable basis, it would have reached 35 mailings or approximately 35 mailings in 1974 and applying the same conversion factor of 7.8,his sales would have amounted to slightly less than 250,000 units, which in that year would have accounted for slightly less than 3 per cent of the total market or his market share would have been slightly less than 3 per cent. Now, Mr. Oreck testified that he was aiming for a 4 to 5 per cent market share, so this is

conservative.

MR. TUROFF: I object and move to strike the last part based upon Mr. Oreck's self-serving conclusory statements.

THE COURT: Overruled.

Q Do companies make sales projections in their normal business operation?

A Oh, it is done all the time. It is done because it is a very good management tool. Companies have to know their future sales in order to make certain management decisions. Depending upon what their future sales will be, they have to determine what their labor force will be, what their inventory will be, what financing they will need, et cetera.

Q Is the method of forecasting that you used one which is commonly used in the industry?

A It is quite common. It is known as the judgmental method. It is based on the best judgment available.

Q Is it considered to be a conservative method of projecting in the future?

A It certainly is.

Q You may have already covered this, but -- in fact, you did, but I noticed in the column of percentage of

sales increase over the preceding year there were three percentage increases listed: 1969, 76 per cent, and in 1970, 42.6, and then 1971, 99.5. You took the lowest percentage from that list, did you not?

A I did. I did it for the purpose of being conservative.

* * *

CROSS EXAMINATION

BY MR. TUROFF:

* * *

* * *

Q You made a study of the vacuum cleaner market as I understand it, is that correct?

A Well, a definition of the vacuum market, an analysis -- an economist would take a different approach when he says did you make a study of the vacuum cleaner market. That involves many facets and many of those facets would not be pertinent to this case.

Q I see. But did you make a study of the peculiar factors, if any, that might affect the sales of vacuum cleaners as differentiated, let's say, from automobiles or deep freezsers, or something like that?

A In fact, that's exactly the point. There are many characteristics of the vacuum cleaners whch apply to automobiles, which apply to any consumer durable industry. They are the same.

Q I see. But to your knowledge are there any factors which are not the same?

A Not in the area that I am interested in for the purposes of this case.

* * *

Q Now, you heard Mr. Oreck testify that he considered his present 4000 machine to be a better machine than he had from Whirlpool?

A Yes, sir.

Q Did you hear that?

A Yes, sir.

Q Wouldn't that have an effect on his sales in the post-'71 period?

A To an economist, what the manufacturer thinks of

his product is immaterial. It is what the consumer thinks of the product that counts.

* * *

Q Now, you talked about one of the things Mr. Oreck did was direct mail advertising?

A That is correct.

Q Will you tell us what direct mail advertising is?

A It is when you send a brochure directly to the potential consumer with all the information that is necessary to make a decision as to whether you want to buy that product or not and perhaps with a coupon which he can send back for purchase.

Q Perhaps you can give us some help here.

Throughout the trial people have referred to direct mail advertising. Does the word "direct" have any significance as opposed to, let's say, mail advertising without the word "direct" on it, if you know?

A Well, no, there is a difference between direct mail and catalog advertising that Sears does. The Sears catalog includes many, many products.

Q The Sears catalog is kind of a thick book?

A That is right.

Q If you want the particular product you got to go into the catalog and look for it?

A That is right.

* * *

* * *

Q Did you also consider inflation?

A Yes -- no, I did not specifically, but in answer to your question I may add that in 1969 and 1970, which is the same period that we are discussing now, the gross national product growth rate decline, and in spite of that growth rate decline, Oreck's sales increased tremendously.

Q Of course, the percentage figure from 1968 to 1969 was a relatively large figure, I think you said. Did you testify to that figure and, as to what it was?

A It is on this table. I have not testified;

it is 7.0 per cent.

Q And, of course, the 1968 sales figure was about 15,000 or thereabouts? I don't have the exhibit in front of me.

A 15,610 .

Q In 1969 it increased to 27,480?

A Yes.

Q There was an increase of 11,800? Is that correct? Now we are working with small base number. When you are working with small base numbers, such as 15,000, and you sell a few more vacuum cleaners, you get a higher increase in sales, do you not, than if you were working with a larger number, let's say, 100,000 vacuum cleaners, and you sold a few more?

A I so testified in my direct. I said the base was quite small, and, therefore the growth rate was quite large .

Q Indeed, if we might use an example, if hypothetically the Oreck Corporation had sold 100 vacuum cleaners and the next year it sold 10 more vacuum cleaners, the increase would be 10 per cent, would it not?

A That is correct.

Q And if instead of selling 100 vacuum cleaners in the year, it had sold a thousand vacuum cleaners, and

then the next year it sold 10 additonal ones, that is, 1010, the increase would have been 1 per cent, if my mathematics are right?

Q And, indeed, if they had sold 10,000 vacuum cleaners and the next year sold 10 more vacuum cleaners, so they sold 10,010, the percentage rate would be one-tenth of 1 per cent.

Now, the vauum cleaner market, if you studied the statistics concerning the total shipments in the vacuum cleaner market as a whole, during the period 1968 and onward --

A Yes, it is in the record.

Q Yes, I know it is. I want to know if you looked at it. Those figures are up in the seven, eight, nine-million area?

A Yes.

Q So a percentage increase when you are talking about a base number of seven, eight or nine million, is much less if the same increase in sales is applied to a 15,000 figure, if you follow me?

A That is correct.

* * *

* * *

MR. HOFFMANN: My next witness is here. It is Ernest Sommer. Before I put him on the stand I would like to read from Plaintiff's Exhibit 160 in evidence, because I think the reading is appropriate at this time as showing background to his testimony.

* * *

(Mr. Hoffman reads from Government's Exhibit 160 in evidence to the jury.)

MR. HOFFMANN: Your Honor, the pages have never actually been numbered, so to follow me I will try to identify as best I can to help my colleagues on the other side by saying it comes in around 12, 14 pages in and has a heading Sears.

(Mr. Hoffmann continues reading from Plaintiff's Exhibit 160 in evidence to the jury.)

* * *

MR. TUROFF: Very good.

I have one other matter, and that is I move to strike and ask that the jury be instructed to disregard all of the last reading from this exhibit. It is in

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evidence over my objection. It is a 1961 report conclusory in nature, after which time Whirlpool, by agreement of everybody, goes out of the vacuum cleaner business.

It came in really in the form of a jury argument. It seems to me that the Court has the power to reconsider its decision concerning this. The jury can't draw any inference from this at all, given the time period.

THE COURT: I think it arguably could have been considered by the jury as defining the relationship between Sears and Whirlpool in the early '60s as a background against how they might assess certain testimony three, four, five, six, seven, eight, nine, ten years later. It is for that reason I admitted it earlier, and I still think it is admissible.

All right.

(Luncheon recess.)

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ERNEST L. SOMMER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOFFMANN:

Q Mr. Sommer, where do you live?

A I live in Hillsdale, New Jersey.

Q What is your occupation?

A I am a Certified Public Accountant.

Q Are you actively engaged in the practice of accountancy?

A I am a partner in the accounting firm of Sommer, Abraham & Gross, located at 424 Madison Avenue, New York City.

Q Are you by any means the senior partner in the firm?

A I am the senior partner of that firm.

Q How many Certified Public Accountants are there in the firm?

A We have a staff of 14 accountants, plus clerical.

Q Can you briefly summarize your education for us?

A I attended the University of Illinois; I received my Bachelors of Business Administration from Pace in New York City; I received a Master of Science from Columbia

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University; I am admitted as a Certified Public Accountant in the States of New York and New Jersey.

Q Would you also please tell us what you employment history has been since you got out of the University?

A When I graduated the University in 1949 and 1947 I worked for a New York City firm of Certified Public Accountants; then I worked for two years for Litton Industri and in 1959 started practicing by myself.

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Q Are you a member of any professional association?

A I am a member of the American Institute of Certified Public Accountants, the New York State Society of Certified Public Accountants, the New Jersey State Society of Certified Public Accountants and the Bergen County Estate Planners Council.

Q And have you been active in those organizations?

A I have been active in various committees of these organizations and presently am president of the Management Advisory Committee of the New Jersey State Society of CPAs.

Q What is that?

A The Management Advisory services rendered by accountants is a specialty that deals with budgets, future projections,prospects of businesses, using companies experienced in making these judgments.

Q Have you done any teaching?

A I have been on the faculty of Pace University. I was after that a faculty supervisor at City University and then taught a few courses in Bergen Community College in New Jersey.

Q Have you been retained as an expert witness by the Oreck Corporation?

A Yes, I have.

Q And can you tell us whether your compensation depends on the outcome of the litigation?

A No, sir.

Q Did you previously do any work for Oreck Corporation or for the individuals Marshall and David Oreck?

A No, sir.

Q When did you start your retention in connection with this matter?

A Toward the end of 1975. December, I believe.

Q This is now June. Is it more than six months?

A Approximately six months.

Q Have you ever done any accounting work for household appliances?

A Yes, I have.

Q Have you done accounting work for distributors in other fields?

A Yes, I have.

Q Have you done work for mail order businesses?

A Yes, we have.

Q And did your work for mail order businesses include work for direct mailing firms?

A Yes, it has.

Q Have you done any work for companies engaged

in national mail order business?

A Yes, I have.

Q Have you been called on in the practice of your profession to make studies of the profits and prospects of businesses?

A Most of our clients are small to medium-sized businesses doing between a million to 20 million dollars annual sales volume and we assist them in their management decisions. This is where the Management Advisory Services comes in in making evaluations both for the present and the future.

Q In the course of your retention by the Oreck Corporation have you had occasion to study the business of Oreck Corporation?

A I have studied the Oreck books and records and the history of Oreck.

Q When you say the books and records, what books and records do you refer to?

A We reviewed their general ledgers, their sales books, some of their purchase records. We worked very closely with Oreck's public accountants. Both their accountants and members of our staff worked in unison in making these studies.

Q Did you in your studies study sales records

which showed the numbers of vacuum cleaners sold by the Oreck Corporation?

A Yes, we did.

Q And did you also consider purchase records, that is to say, records showing the number of units purchased by the Oreck Corporation?

A Yes, we did.

Q I show you 106, which is in evidence, the Oreck Corporation schedule of actual unit sales annual increase over the preceding year and percentage of chain. Did you have anything to do with the preparating of that exhibit?

A This exhibit -- this schedule was prepared under my supervision working with my staff and Oreck's public accountants.

Q And, sir, did you also work with David Oreck in its preparation?

A Not in connection with this schedule.

Q The first column is a total of all units sold. Did you take them off from the books and records?

A That was taken from the sales records of Oreck Corporation.

Q Now I ask you, were these three years which are referred to on the chart as showing a percentage of sales increase -- 69, 70 and 71 -- were these selected to show

the growth of the company?

A These were selected to show the growth of the new marketing that started in 1967 when Oreck entered the mail order business.

Q And why did you start with the year 1968 for computing a percentage of sales increase over the preceding year as happens in the --

A 1968 was the first full year where Oreck was in the mail order business for the whole year and it presented a base year to measure the subsequent year's performance.

xx (Plaintiff's Exhibit 106-B marked for identification.)

Q Plaintiff's Exhibit 106-B for identification is a chart headed "Oreck Corporation, Schedule of Actual Unit Sales Annual Increase Over Preceding Year And Percentage of Change."

Do you note there there are three columns again?

A Yes, sir.

Q Do you have still in front of you 106?

A Yes, I do.

Q Is this new chart, 106-B, any different from 106?

A Yes, it is, because it has additional information

on it.

Q How was the chart prepared?

A The units sold were prepared as previously -- as I mentioned previously from the sales records of the company. The second column, unit sales increase over the preceding year, shows the increase from one year to the next.

Q Isn't that also on the previous exhibit?

A That has the same numbers as the previous year.

Q And the third column?

A And the third column is the percentage which is also on the previous exhibit.

Q So what is new and different from the other exhibit here?

A This exhibit shows that for the three last years --

Q Please don't summarize what it shows. There have been two entries made here near the bottom, is that right?

A That's correct.

Q Are these entries an application of arithmetic or machematics?

A These entries are an application of arithmetic.

Q And was this prepared by you or under your supervision?

A This was prepared under my supervision.

MR. HOFFMANN: I offer it in evidence, your Honor.

* * *

* * *

Q Mr. Sommer, would you be good enough to put aside this exhibit, which has not been received, and look, please, at Exhibit 106.

The last column there reflects what?

A The last column reflects the annual increase in sales over the preceding year -- the annual percentage increase over the preceding year.

Q And that shows three such annual increases, is that right?

A It shows three such annual increases.

* * *

xx (Plaintiff's Exhibit 106-C marked for identification.)

* * *

Q I show you 106-C, a chart that shows the Oreck Corporation projected unit sales based on the 42.6 growth factor through 1974, 1972 to June 14, 1976.

Can you tell me how this exhibit was prepared?

A This exhibit was prepared based upon the actual

results of unit sales for the year ended December 31, 1971, and then increasing it by 42.6 per cent increase, which was the lowest percentage in the three years encompassing 1969, '70 and '71, the lowest percentage of increase that Oreck experienced in those three years.

* * *

* * *

Q Mr. Sommer, Exhibit 106-C for identification has the calendar year '71 showing actual units?

A Correct.

Q And then that comes, does it not, from the prior exhibit?

A That's correct.

Q And then you have a calendar year 1972 showing projected units?

A Correct, sir.

Q How is that arrived at as a matter of arithmetic or accounting?

* * *

* * *

A The 1972 projected unit sales --

MR. TUROFF: I don't think that is the question.

Q What mathematics or accounting?

A I multiplied the 1971 CVR-2000 sales by 42.6 per cent.

Q Why did you do that?

A Because that was the lowest year in the three preceding years that Oreck --

Q That is the units you used, is that correct?

A Correct.

Q 42.6 per cent?

A 42.6 per cent. In 1971 Oreck sold 58,309 model CVR-2000 vacuum cleaners. I increased that number by 42.6 per cent to arrive at 80 --

MR. TUROFF: I object to reading from the figures.

MR. HOFFMANN: Your Honor, I just want to establish the method. I think the witness said he uses this 42.6 figure in order to carry from actual units for '71 into projected units in '72.

Q Is that right?

A That is correct.

Q And is the rest of the chart based upon mathematical calculation?

A The rest of the chart is based upon the same mathematical calculations.

Q Just a moment, sir. If it comes in evidence I will be able to go through it with you. It is based on mathematical computations done by you or under your supervision?

* * *

(Plaintiff's Exhibit 106-C was received in evidence.)

xx Q Now, sir, coming back to 106-C, the first column, you testified is the actual units sold in 1971?

A Yes.

Q Would you look at the calendar year 1972 projected units and go through that for us telling us what mathematical or arithmetical function was performed to arrive at the items in the column?

A 1972 units are based Upon an increase of 42.6 per cent, based upon the actual 1971 period. In 1971 Oreck Corporation sold 58,309 Model CVR-2000, which when increased by 42.6 per cent would have projected to 83.149 units in 1972.

* * *

Q Please continue?

A In 1971 Oreck sold 13,938 Model 33, which when increased by 42.6 per cent would have projected out to 19,876 units in 1972.

In 1971 Oreck had actual sales of the Model

CVR-3000 amounting to 5,956 units, which when increased by 42.6 per cent would have yielded sales of 8,493 units in 1972, giving a total increase of their business in units of 42.6 per cent.

* * *

* * *

(Plaintiff's Exhibit 106-D was marked for identification.)

xx Q Do you have 106-D in front of you?

A Yes.

Q Can you tell us how this exhibit for identification was prepared?

A This exhibit was based upon 106-C, using the sales price by which Oreck was selling these units towards

the end of 1971, the cost price by which they were paying Whirlpool for these units to arrive at a gross profit as a result of these sales.

Q Where were the sales and cost prices derived from? What source?

A The sales and cost prices were derived from Whirlpool invoices -- I'm sorry -- the cost prices were derived from Whirlpool invoices rendered to Oreck, and the sales prices were derived from our examining of sales invoices that Oreck rendered to its customers.

Q What is the basis for the gross profit figure which is shown as the bottom line for each of those different calendar years?

A The gross profit is the difference between what Oreck sold the unit for to a customer less what it paid Whirlpool, the balance being what it retained as gross profit.

* * *

* * *

MR. HOFFMANN: The question I was going to ask is what are the relevant prices for the CVR-2000.

THE WITNESS: The CVR-2000 was sold in 1971 by Oreck for $48.60; they paid $28.94 to Whirlpool, in effect, leaving a gross profit of approximately $19.66.

MR. TUROFF: I am going to that kind of characterization of gross profit.

Q Is that how the last line was computed, using those figures?

A That is how those numbers were computed.

MR. TUROFF: I object to the use of the term "gross profit".

THE COURT: I will sustain that objection at this point, unless we get some sort of a definition.

Q Can you tell us an accountant what your background and experience is, how the words gross profit are used in accountancy?

THE COURT: As you have been using them here.

THE WITNESS: The gross profit as it has been used here is the amount that Oreck collected from a customer, less what it paid to Whirlpool, leaving an

amount out of which Oreck, the amount which is left, which I have to find here, is gross profit. Out of that amount Oreck would have had to pay its mailing expenses; this is not the net profit; it is the gross profit.

Q I notice that the figures increase up until the year 1974 and then for 1975 level off at the same figure.

Is that for the same reasons you gave with respect to the previous exhibit?

A Yes.

Q This was the same formulization used?

A The same formulization was used and same sales price and cost price was used for all the years on this exhibit from 1972 through June 14, 1976.

MR. HOFFMANN: I now offer 106-D in evidence.

MR. TUROFF: We object. This seems to me misleading and irrelevant. Gross profit is wholly irrelevant as he defined it for this case.

THE COURT: What are the balance of the exhibits you intend to offer?

(At the side bar.)

MR. HOFFMANN: 106-E to 106-N.

* * *

* * *

Q Mr. Sommer, you testified on Friday concerning your membership in the New Jersey Accounting Society.

Do you recall that? The reporter seems to have indicated that you said you were present at that society. Is that the case?

A I am a member of the Management Advisory Committee, not the president of it.

Q I show you Plaintiff's Exhibit 106-D for identification and ask whether you can tell us how it was prepared?

A 106-D was prepared from the company's books and records and Schedule 106-C.

Q 106-C is what is in evidence.

msll Sommer - direct 1193

A The projected sales based upon a 42.6 per cent rise leveling off in 1975.

Q Did you use the same sales and cost prices for all years for the respective models appearing on 106-D?

A We used all of the cost prices and sales prices in effect toward the end of 1971 in calculating the sales, cost of sales and gross profit.

If I may, I can give you the prices that they used.

Q If the Court will permit.

A Model CVR-2000 was sold tothe customers at the end of 1971 for $48.60. Whirlpool's billing price was $28.94, giving a gross profit on Model CVR-2000 of $19.66.

The Model CAP-33 was sold for $65 to the customers. Whirlpool's price to Oreck was $37.10 and the company had a gross profit of $27.90.

Model CVR-3000 was sold to the customers at $48.30. Whirlpool's billing price to Oreck was $30.17, giving a gross profit of $18.13.

And these numbers were consistently used for the period January 1st, '72 to June 14, 1976.

Q Looking at the proposed exhibit, I notice that from the years '72 to '74 there is an increase in the gross

profit. Is that correct?

A That is correct.

Q Can you tell us the reasons, as you understand them, for such an increase?

A There were projections made which increased the sales from '71 to '72 to '73 to '74 by 42.6 per cent.

In 1974 Oreck had 2.75 per cent of the market value of the vacuum cleaner, universe market value, and in 1975 we kept the sales volume the same because there was a slight decline in the market, in the United States market, but Whirlpool -- I am sorry, but Oreck had a 2.96 per cent or a little bit less than 3 per cent of the market share in 1975 by maintaining level numbers.

Q And then is the same true that you didn't put in any increase for the partial year January 1, 1976 to June 14, 1976, the date of the trial?

A We kept that constant with the '74-'75 figures.

MR. HOFFMANN: I offer that in evidence, your Honor.

MR. TUROFF: Your Honor, I object to this document as purely a speculative document, completely out of accord with reality.

THE COURT: I will do it this way:

I am going to admit it tentatively subject to a

motion to strike.

I do not authorize reading this to the jury until the witness' testimony is concluded and I have considered the matter more fully.

MR. HOFFMANN: I understand, your Honor.

MR. TUROFF: Thank you.

THE COURT: All right.

Q Now, Mr. Sommer, do you have in front of you 106-E?

A Yes.

* * *

(Plaintiff's Exhibit 106-E was marked for identification.)

xx Q Mr. Sommer, I show you 106-E, entitled "Oreck Corporation Residual Sales, Average Dollar Sales Per Unit" and I ask you what this chart represents?

* * *

* * *

A This chart was prepared from the company's books and records. It shows the top -- the top part of the chart shows the number of units Oreck sold from 1964 through June 30, 1971 during the period it was in existence.

Oreck, besides selling vacuum cleaners, also sells dust bags and replacement parts to its customers.

We then took the total number of units that had been sold through June 30th, 1971, 170,119 units.

In the year subsequent to June 30th, 1971 -- and Oreck Corporation keeps its books on a fiscal year basis -- Oreck sold $603,757 --

MR. TUROFF: I am going to object, your Honor, to the witness reading figures off this chart which is not in evidence. Your Honor just said you were going to reserve decision on these and would not permit it read to the jury.

MR. HOFFMANN: I am asking how it is constructed, your Honor.

THE COURT: I think Mr. Turoff has a good point. Let us confine ourselves as to how it was done.

A We took the sales of dust bags for the year ended June 30, 1972 and divided it into the number of units that had been sold prior to the beginning of that year to arrive at an average sale of dust bags to all outstanding units, customers.

Q The words "residicual sales" used on top and also in the calculation, what is meant by that phrase as you use it?

A Each year as the vacuum cleaners are outstnding Oreck continues to sell dust bags, parts and accessories in a replacement and it sends mailings to its customers to apprise them of the availability of this product.

Q Now, sir, the first part of the exhibit shows that you go back to 1964, does it not?

A Yes, it does.

Q Why did you do that?

A Because, according to Whirlpool Corporation -- I believe it is Exhibit 109 -- they estimate that the life of a vacuum cleaner is 15 years and Oreck was following up on all of its customers periodically a number of times a year reminding them of its products, including dust bags and replacement parts.

Q You said you believed that the exhibit you referred to was 109.

I show you 106-A and ask if that isn't the exhibit you had in mind.

A Correction: 106-A.

Q Finally there is a column caled "Profit Percentage and Profit in Dollars."

Without telling us the figures that appear, can you tell us how the profit percentage was arrived at?

A We went to the underlying records to determine what the cost of a dust bag was, the mailing expenses and the components that each customer ordered and arrived at a profit percentage taking into consideration both the cost of the dust bags, the mailing costs, labels, et cetera.

And the same thing was done with accessories and parts because they were two separate kinds of residual sales.

MR. HOFFMANN: I now offer 106-E in evidence.

MR. TUROFF: I make an objection.

THE COURT: I receive it on the same basis.

* * *

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Q Mr. Sommer, you have 106-F for identification in front of you?

A Yes.

Q I address you to the title Oreck Corporation Projected Residual Sales on Unit Sales After January 1, 1972, Dust Bags, Parts and Accessories, January 1, 1972, To June 14, 1976.

First of all, what does that mean,projected residual sales on unit sales?

A As I indicated in discussing the previous schedule, Oreck has a history of selling its customers in ongoing volume, not each, but many of their customers, dust bags and replacement parts.

Q Tell us from what material this was projected?

A This was projected from Exhibit 106-C, which showed the projected sales for the years 1972, 1973, through 1976, and the profit per unit as calculated on Exhibit 106-E,which came from the books of accounts.

MR. HOFFMANN: I offer it in evidence, your Honor.

MR. TUROFF: Objection.

THE COURT: Same ruling, 106-F received, subject to motion to strike.

xx

(Plaintiff's Exhibit 106-F received in evidence.)

BY MR. HOFFMANN:

Q Mr. Sommer, I show you what has been marked as 106-G for identification. Can you tell us what this chart is?

A 106--if I may backtrack -- 106-F showed the residual sales to the date of trial, starting with January 1, 1972, through June 14, 1976.

106-G projects the future sales of dust bags and accessories from the date of trial through June 14, 1986.

Q What is the reason for that?

A As I pointed out in Exhibit 106-E, there is a re-ordering of parts, dust bags. On 106-A Whirlpool indicated that the life of a vacuum cleaner is 15 years. For the purposes of these calculations we assumed that the life of a vacuum cleaner was only 10 years and, therefore, terminated 10 years from June 14, rather than 15 years.

Q 10 years from June 14, 1976?

A Yes.

MR. HOFFMANN: I offer it in evidence.

MR. TUROFF: Same objection.

THE COURT: Same ruling.

Q I show you 106-H for identification. From what source or sources was this prepared?

A This was prepared from the company's actual books and records, their sales history, and in order to show the complete picture of the company we projected the estimated sales of dust bags and accessories on units that were sold prior to December 31, 1971.

Q For what period of time was the projection made?

A The projection was made through the date of the trial, June 14, 1976, in order to show what the total picture of Oreck would have looked like had they been able to do both their old business and continued to sell as projected.

Q I notice here that the chart runs from the calendar year starting June 15, 1976, to June 14, 1986. Why is that?

A Not on H.

MR. HOFFMANN: My deep regrets. I had a copy that had been mismarked. I offer 106-H in evidence.

MR. TUROFF: Same objection.

THE COURT: Same ruling.

xx (Plaintiff's Exhibit 106-H received in evidence.)

Q Do you have in front of you 106-I for identification?

A Yes, sir.

Q Sir, 106-I is entitled Oreck Corporation Projected Statement Of Income 1972 To June 14, 1976. Can you tell us what the basis is for the preparation of this exhibit?

A This exhibit is a culmination of all the previous exhibits, starting with 106-B, where I explained just now summarizing what the operations of the company would have looked like had they sold the projected number of vacuum cleaners and had the residual sales taken place that could reasonably could be expected.

Q The exhibit contains a line for gross profit. How was gross profit computed for the exhibit, again without giving us the numbers?

A The gross profit was computed based upon the projected sales less the cost to Whirlpool. There is a summary of Exhibit D, I believe, 106-D. This is repeating 106-D.

Q You mean less what was paid for the vacuum cleaner?

A Less what was paid for th- vacuum cleaner.

Q Now, sir, the last column, I see two entries in the last column, totals from January 1, 1972, to June 14, 1976, and then beneath that two entries under the heading Residual Sales, Sales Prior to December 31, 1971, and Sales After December 31, 1972. Will you explain these

figures to us, again without giving us the pr e numbers?

A In order to show the completeness of the operation and the continuity of the operation, we have broken down the residual profits that Oreck might have expected because of vacuum cleaners that had been sold prior to December 31, 1971, and then we show separately the residual profits that Oreck would have expected, could have expected based upon the projected sales from 1972 to the date of this trial.

Q How did you arrive at these operating expense items which appear on the proposed exhibit, for example, the first one, direct mailing?

A Based upon our review of the company's records, discussions with management, based upon the direct mail conversion ratio of six vacuum cleaners per customer --

Q You are in error.

A Six customers per thousand mailings, we calculated what it would have cost to sell the CVR-2000 and the CAP based upon sending out enough literature at $130 a thousand to yield a six per thousand return, and that was based upon our reviewing the company's books and records for prior years, using that number.

Q Your observations concerning the conversion rate are based upon your own independent review of the records

of the company? Is that what you are saying?

A Yes. This does not include the CVR-3000 basically. The CVR-3000 was partially sold through other selling channels, and you have other selling expenses to cover the cost of selling the CVR-3000.

MR. HOFFMANN: I offer 106-I.

MR. TUROFF: Objection.

THE COURT: What is the basis for the objection?

2 MR. TUROFF: Your Honor, this exhibit is based upon all of the other previous exhibits as to which you have ruled. I have objections to all of the other exhibits, and this one then becomes objectionable if my objections are sustained as to the others.

THE COURT: That objection I will overrule, as I have the others.

xx (Plaintiff's Exhibit 106-I received in evidence.)

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Q In preparing all of these exhibits which we have talked about in 106, in the 106 series, you have ignored, have you not, what Oreck's actual sales were in the years 1972 and subsequent?

A Correct.

Q It is entirely based upon a projection of what Oreck did in 1971 and before, is that correct?

A Correct.

Q I'm sorry, I can't hear you.

A Correct, with the exception of looking to see that there was some residual sales coming through.

Q I see.

Now, did you examine the books and records for Oreck Corporation for the years 1972 and subsequent?

A No, sir.

Q To your knowledge is the Oreck Corporation still in business?

A As far as I know, it is.

Q Is it still in the business of selling vacuum cleaners to your knowledge?

A I believe they are, but I am not too sure.

MR. HOFFMANN: Would you speak up, sir.

A I believe they are, but we didn't check their records.

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Q When we get to Exhibit 106-D, let's take the column that says "Model CVR-2000" and then you have got a column "Sales" and a column "Cost of Goods Sold," is that correct?

A Correct.

Q And you took the number of units which were projected on Exhibit 106-C?

A Correct.

Q Right. The number they would have sold and multiplied it by Oreck's selling price which you testified to, is that correct?

A Right.

Q And that is how you came up with all numbers?

A Oreck's selling price in 1971.

Q Oreck's selling price in 1971. And under "Cost of Goods Sold," you multiplied the number of units you believe Oreck would have sold by Whirlpool's selling price in 1971, is that correct?

A Correct.

Q And you did the same for Model CAP-33? It says 33 here, but I think we can agree it it CAP-33?

A Yes.

Q And Model CVR-3000?

A Correct.

Q And then the bottom column is a total of all those three models; is that correct?

A Correct.

Q Now, are you aware of the inflation rate in this country from the year 1971 to present?

A Yes, I am.

Q Do you know what that is?

A It is approximately 30 per cent.

Q Do you believe, Mr. Sommer, that it is reasonable to assume that Oreck's sale price for these vacuum cleaners would not have increased from 1971 to 1976?

A I was trying to be conservative making --

Q That is not the question I asked. Do you think it is reasonable to believe that Oreck's sales prices would have remained the same from 1971 to the present date?

A I don't know.

Q You don't know one way or the other. But you didn't take inflation into account when you made up this exhibit?

A I was trying to arrive at a gross profit.

THE COURT: No, listen.

THE WITNESS: Could you repeat the question?

THE COURT: Did you take inflation into account?

THE WITNESS: I did not take inflation into account.

THE COURT: All right.

Q You also didn't take inflation into account when you calculated Whirlpool's selling price to Oreck, did you?

A That's correct.

Q So if Whirlpool's selling price for these vacuum cleaners had increased from 1971 to the present the figures for cost of goods sold here would all be higher than the figures you got here?

A Correct.

Q Isn't that correct?

A Yes.

Q And depending on whether or not Oreck increased its sales price to cover any increase in Whirlpool's selling price to Oreck, the gross profit arrived in each of these years could have been different than what is on here?

A It could have been higher or lower.

Q And, as a matter of fact, it is probable that these figures are not what the case would be, isn't that so?

A I don't know.

Q Do you think it is probable that from 1971 to 1976 Whirlpool would not have increased its price to Oreck for vacuum cleaners?

A They probably would have.

Q I see. So at least we can agree that the cost of goods sold is probably understated on this exhibit,

can't we?

A Correct, but that would have been passed on and it could have been passed on in the selling price.

Q It could have been, all right. And, of course, if he increased the selling price that might have had an effect on how many vacuum cleaners people would have been willing to buy from him, isn't that true?

A That did not affect --

Q You didn't take that into consideration, is that correct?

A Correct.

Q But it is possible that if Oreck had raised the price of this vacuum cleaner that some people who would have bough- it before would have decided now they don't want to buy it, is that correct?

A That's possible.

Q So then the sales projection would have been off, is that correct?

A It's not correct. It's possible.

Q It's possible. Well, you have some experience in mail order business, don't you?

A Yes.

Q Direct mail business, I should say. Do you have any accounts selling items in which the price didn't

increase from 1971 to 1976?

A No.

Q How many clients do you have of that nature, roughly?

A About half a dozen.

Q A half a dozen. And their cost of goods sold increased in every case, didn't they?

A Correct, and they have been able to pass it on to their customers.

Q I see. But that is a function of the individual business, you can't make a judgment with regard to Oreck, can you?

A No.

Q You don't know whether Oreck could pass it on or not.

Now, when we go to 106-E, this is a schedule of what you described as residual sales, is that correct?

A Yes, sir.

Q Now, that is dust bags and that's accessories and parts?

A And parts.

Q Okay. And it appears to me that the figure for dust bags is about six times as large as the figure for parts and accessories?

A Correct.

Q I take it it would be a fair statement based upon your examination of Oreck's business and its records that dust bags are the primary source of residual sales?

A Correct.

* * *

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Q Just before we went to lunch I had asked you some questions about 106-E. Do you have Exhibit 106-E there?

A Yes.

Q In this particular I asked you about how you calculated the profit on the dust bags. Do you remember that?

A Yes.

Q Now, when you determined what Oreck's cost was for the dust bags, what did you look at?

A I looked at the Oreck invoices and the associated costs that went into delivering these dust bags to the customer.

Q Did you look at the bills to the Oreck Corporation from the Modern Dust Bag Company?

A Yes.

Q The Modern dust bag isn't Whirlpool, is it?

A I don't know.

Q As a matter of fact, Oreck Corporation didn't buy its replacement dust bags from Whirlpool, did it?

A I think you are right.

Q So that Oreck Corporation had a supply of dust bags throughout the period subsequent to 1971, didn't it?

A Correct.

Q It had enough dust bags to supply for every machine it sold prior to 1971?

A Correct.

Q Now, moving to Exhibit 106-F, would you tell us again what this is? I am not quite sure in my own mind.

A 106-F is the estimated profit per unit in the year subsequent to sale. In other words, if you may recall, we estimated for the year 1972 --

Q Well, let us not read the figures.

A We estimate certain sales under Exhibit C which is in evidence and we assumed that the year of sale there would be no sale of dust bags and that dust bag and accessory part sales would start the following year.

Q If I understand you, then, what this exhibit shows is that on vacuum cleaners you project Oreck would have sold in 1972, then you say that based upon those potential sales, the year 1973 you would have certain residual sales of vacuum cleaner dust bags and parts in connection with those

1972 vacuum cleaners?

A Correct.

Q You went down and porjected what he would have sold in '73 and '74, et cetera?

A Yes.

Q Now, this also makes no attempt to figure in what he actually sold, does it?

A There is a different schedule that shows what he actually sold.

Q But this schedule does not?

A This is based on projected sales for 1972.

Q And this exhibit does not show the results of Oreck's replacement sales of dust bags for the CVR-4000 vacuum cleaner, does it?

A Correct.

Q And it does not show the sales of dust bags that he made for the CVR-4300, does it?

A Correct.

Q This exhibit is made up on the assumptioon that he made no machines to sell and was out of business?

A This is part of a component, and if you recall Exhibit N took into consideration the question that you are raising.

THE COURT: Mr. Sommer, I take it the answer to

counsel's question is yes?

THE COURT: It is out of context.

Q I am just asking, this exhibit does not include what Oreck's actual sales were? It assumes he was out of business on this one?

A No.

Q This does not assume he was out of business?

A This only assumes that these units were not sold.

Q But if he sold units during the year 1972, then exhibit is inaccurate?

A This does not include any other units sold.

Q It ignores the actual performance of Oreck Corporation, does it not?

A Except for dust bags for prior years.

* * *

* * *

Q Why don't you tell me, tell us, please, what expenses you included in the direct mailing category?

A List rentals.

Q Pardon me?

A List rentals, making up the brochures, the fulfillment houses, the typography, anything that gets involved with getting a mailing piece for a customer.

Q What about the postage?

A The postage is included in there, too.

Q You used a figure of $130?

A Per thousand.

Q Per thousand. And that is simply for postage, or is that for all of the expenses?

A That's for all of the expenses.

Q And did you use the figure $130 per thousand throughout the years '72, '73, '74, '75 and "76?

A Yes, I did.

Q And there were several postage rate increases during that time, weren't there?

A Yes, sir.

Q You didn't take those into account, did you?

A No, but you do have savings --

THE COURT: Just answer.

A No.

THE COURT: All right.

Q Did the price of printing and paper go up in the period 1972 through June 14, 1976?

A Not -- it's based upon the volume which you print and the printing volume.

Q Did the price of paper go up in the period I972 to June 14, 1976?

A The price of paper went up marginally, yes.

Q Did the cost of printing go up in that period?

A Marginally, but again it's a factor of the print order.

Q But you didn't take into account the cost increases in postage or in printing or in paper, you simply took your $130 a thousand figure?

A Correct.

Q In 1975 your figures level off, you give the same figure of 1975 direct mailing expenses that you have for 1974 direct mailing expense?

A Correct.

Q Isn't it possible that if business fell off in that way that Oreck Corporation would have to spend more money in directing mailing expense to sell the same number of units?

A No, not necessarily.

Q But it could be, couldn't it?

A Because you have a greater return on the repetitiveness of advertising which makes itself manifest. We actually used, as I pointed out to you, a 6 per thousand ratio, when in 1971 it was 6.1, and with the replacement market of vacuum cleaners, your return in the mail order business as you recirculate increases and we have felt that -- not to reflect this.

* * *

* * *

Q But I thought you just told me that you took Oreck's 1971 figures and increased them proportionately?

A No.

Q You didn't do that? What did you do?

A I analyzed the 1971 figures and projected them out on the basis of the increases in volume and some other factors that were inherest or obvious with the price structu that would cause these general administrative expenses to go up.

Q So, in other words, unlike the other figures on this page you didn't simply project from 1971?

A Correct.

Q As to these figures, you made an independent

judgment as to what the expenses would be in each year?

A That is correct.

* * *

* * *

REDIRECT EXAMINATION

BY MR. HOFFMANN:

Q Mr. Sommer, do you know whether in the period of time since 1971 the gross national product of the United States of America has increased? Is it greater now than it was in 1971?

A I believe it is.

Q Do you know, sir, what happens when the figures for costs increase in an inflationary market? Do you know what happens to price as an accounting matter?

* * *

* * *

A Vendors and manufacturers pass this price along to their cus mers.

Q Now, it could be, could it not, that in an inflationary market a product would become overpriced and therefore the demand for it would shrink?

A That is correct.

Q Now, sir, do you happen to know anything about the total sales of vacuum cleaners during the so-called inflationary period, whether they increased or whether they decreased in total?

A In relationship to 1971 they increased in 1972, 1973, and then there were declines in 1974 and 1975 in the United States, but not in Canada.

Q And if you take the '75 figure, the last figure, and compare it with the situation as it existed in 1971, it is about the same, is it not?

A In fact, 1975 is probably 3 or 4 per cent less than the 1971 figure.

Q So in respect of a particular goods, in this case we are talking about vacuum cleaners, is there any way of knowing other than getting to the total number of units

sold, whether or not inflation is having an impact on the sale of a vacuum cleaner?

A That is correct.

Q Isn't it true that there are many household products, or many products being bought and sold in the United States, where even though there has been inflation the price has decreased since 1971?

A I buy radios at less now than I did in 1971. My TV set the same thing.

Q And certainly then it is fair to state that there were some products which did not inflate in price. Now, sir, in respect to 107-F, do you have that in front of you?

A Yes, sis.

Q The profit per unit about which you were cross-examined remained a constant, did it not, throughout your calculations as reflected on this exhibit?

A On the basis of our projection, yes.

Q And why, please, is it a constant? Why is it the same $2.34?

A Because our review of the pricing led us to believe that this would have been a consistent profit that would have been realized on the sale of dust bags and accessories.

Q Now, suppose you had said, "Everything gets inflated, let's add another dollar to the price and another figure for profit per unit," let's say we were

to say in preparing this exhibit as accountants that we ought to put in an inflationary factor in the profit per unit, would that render the schedule more or less precise than it is?

A An inflationary factor generally would imply that you are making more profit because the manufacturer or a dealer works on markup rather than measure of profit. So if the cost price goes up, his markup goes up, so he actually many times benefits from it, from an increase in price.

Q Was it then in your view a conservative thing to do, to leave it a constant for those years?

* * *

A I believe it was consistent and conservative.

* * *

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MR. HOFFMANN: Your Honor, my colleagues remind me of a very minor detail. You will remember that after the defendants read from the deposition of Smith I reserved the opportunity to read some rebutting matters from Smith's testimony. I think it would be very briefly done.

THE COURT: Why don't you do that right now?

MR. HOFFMANN: Could we have one minute?

mp8 "Smith 1294

Just a couple of lines from the witness on page 270. Mr. Smith of Sears was being examined on September 6, 1974, by myself, and Mr. Turoff had just read from 270:

"Q Then does it not follow also that the same production that you are talking about were also being used to produce vacuum cleaners which prior to the termination of the sales agreement were being sold by Oreck? Is that also true?

"A Yes, sir.

"Q And now Sears is saddened by the loss of this competitor, is that yourtestimony?

"A I as the buyer was saddened."

And now to 273, starting at the bottom of 272, line 14:

"Q If those expenses are high for Whirlpool, then the expected effect, is it not, that Whirlpool will try to raise its price to Sears, is that right, for selling fewer units than it might otherwise sell, if Oreck were around?

"A For any given reason. If production goes down, the cost goes up.

"Q Is that cost necessarily passed on to the purchaser?

"A Yes, sir.

"Q Did it happen to you when Oreck left?

"A No, because we at that time entered into a more aggressive campaign of selling ourselves.

"Q You sold more vacuum cleaners?

"A Yes, sir.

"Q After the Oreck sales contract" --

T3

* * *

Q Where do you reside, Mr. Sweet?

A Clairmont, California.

Q And what is your profession or occupation?

A I am retired, sir.

Q And prior to the time you retired, by whom were you employed?

A The Whirlpool Corporation.

Q Did you retired from Whirlpool?

A Yes, sir.

Q When did you retire?

A In November, 1968.

Q All right. Will you tell us, please, what your

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jwp2 Sweet-direct

work history at Whirlpool Corporation was?

A I started there in 1958 and was general manager of the Refrigeration Division.

Subsequently, about 1961, I became director of marketing.

In '63 I became director of the residential and commercial products division and retired in '68.

Q Now, at any time during your tenure --

MR. HOFFMANN: Pardon me, I didn't hear the answer, when the gentleman retired.

THE WITNESS: November, '68.

Q Try and keep your voice up, Mr. Sweet, so everybody can hear.

A Yes, sir.

Q During your tenure at Whirlpool, did you have any duties at any time which related to the sale of products by Whirlpool Corporation to Sears Roebuck?

A No, sir.

Q In 1966, what was your position?

A Director of the residential and commercial products division.

Q And what were your duties as director of the residential and commercial products division?

A To assist in the sale of various products that

were sold to those two categories.

Q And I take it that did not include sales in those categories to Sears Roebuck?

A Correct.

Q At any time did your duties include anything having to do with the Oreck Corporation?

A Yes.

* * *

* * *

Q Calling your attention to September of 1966, did you have occasion to meet with Mr. David Oreck?

A Yes, sir.

Q And what was the purpose of that meeting?

A To discuss with him the ways of means of getting back on the track for the type of sales operation that the program was originally started for.

Q When you say getting back on the track, what do you mean?

A The original intent was to develop an avenue of sales through department stores, and suddenly we found that there were fewer and fewer sales to department stores than sales to other type outlets.

Q When you say "other type outlets," what do you mean?

A Hotels, motels and commercial type operators.

Q Would janitorial supply be in that category?

A Janitorial supplies.

Q Was anyone else present at this meeting in

September of 1966 besides yourself and Mr. David Oreck?

A No, sir.

Q Where did the meeting take place?

A In Benton Harbor, Michigan.

Q That is the main office of Whirlpool Corporation?

A Yes, sir.

Q And as best you can recall what did you say to Mr. Oreck and what did Mr. Oreck say to you on that occasion?

A We discussed ways and means of getting into the original distribution channels and I listened, of course, to Mr. Oreck advising me that it was easier to sell the other channels and he was considerable misgivings about his relationship with Whirlpool in the form of hamstringing his operation.

And he suggested at the time that if we wanted to discontinue the relationship that we should pay him for the expenses he had encountered up to that point and take him out with a whole skin.

However, he said at the time that he would prefer to remain in the business.

That was about the gist of the conversation.

Q Did you respond at that time to Mr. Oreck's statements?

A Yes, sir, to developall ways and means possible to get back on the original track for which the agreement and arrangement was originally established.

Q As a result of that meeting, did you take any action?

A Yes, we checked into the possibilities of aiding him and advised him that we would continue to run out his contract.

Q When you say "continue to run out his contract," what do you mean?

A His contract expired in 1968.

Q Yes? What did you mean by "we would continue to run out his contract"?

A We would continue to furnish product for him so that he could continue selling the products.

Q Did you make any recommendation to anyone at Whirlpool as a result of that meeting?

A Yes, sir.

Q To whom did you make the recommendation?

A To my boss, Mr. Jack Sparks.

Q What recommendation did you make?

A That we should consider ending the contract when the time came for it to expire.

Q When did you make this recommendation?

wp8 Sweet-direct

A In September of '66.

Q After this meeting with Mr. Oreck?

A Right.

Q What part, if any, did Sears Roebuck & Company play in your recommendation that Mr. Oreck or Oreck Corporation should be terminated at the end of this contract?

MR. HOFFMANN: Your Honor, I object.

A Sears Roebuck --

THE COURT: The form of the question?

MR.HOFFMANN: Yes.

THE COURT: I have to sustain the objection as to form.

Q Did you consult with anyone at Sears concerning your recommendation to Mr. Sparks?

A No, sir.

Q Did you communicate in any way with anyone at Sears concerning your recommendation to Mr. Sparks?

A No, sir.

Q Did Sears have anything to do with your recommendation to Mr. Sparks?

A None whatsoever.

Q Now,prior to 1968 did you have any other discussions with Mr.David Oreck in which the subject of termination of his agreement was discussed?

A Yes, sir.

Q And when was that to the best of your recollection?

A In 1967, the forepart of 1967.

Q And where did that conversation take place?

A I don't remember.

Q All right. Was it in person or over the telephone? Do you recall that?

A It was in person.

Q Do you recall who was present other than yourself and I think Mr. David Oreck?

A Just the two of us.

Q And can you give us the substance of that conversation as best you can recall?

A He asked that we consider an extension or a renewal, a new contract at the expiration of the one that was then in effect.

Q Let me just stop you. Is this the conversation in 1967 that you are telling us about?

A '68.

Q '68?

A I'm sorry, '68.

Q Did you have a conversation in 1967 about termination?

wp10 Sweet-direct

A Yes sir.

Q Do you recall where that conversation took place?

A It might have been New Orleans. I can't --

Q Do you recall who was there?

A Mr. Sparks and I.

Q In 1967, is that correct?

A Well, now, I can't recall whether it was '67 or early '68, but we both met with Mr. Oreck in New Orleans.

Q If I suggest to you that it was in 1968, would that refresh your recollection as to the date?

A June or July of '68.

THE COURT: To the best of your recollection, you met in New Orleans?

THE WITNESS: Yes, that's my recollection. It could be a month off.

Q And now you believe it was 1968?

A Right.

Q So do I take it then that you do not have a recollection of a conversation in 1967 with Mr. Oreck on the subject of termination?

MR. HOFFMANN: I object to that. There is no foundation in the testimony.

MR. TUROFF: I am trying to establish when --

THE COURT: Overruled.

wpll Sweet-direct

Go ahead.

A Virtually everytime that I would meet with Mr. Oreck, that subject came up.

Q Did you ever indicate to him in any conversation in 1967 that Whirlpool was considering termination?

A Yes, sir.

Q On how many occasions?

A Oh, several.

MR. TUROFF: Excuse me one moment.

(Pause.)

Q Did there come a time in 1968 when Whirlpool exercised its right to terminate the Oreck distributorship agreement?

A Yes, sir.

Q And when did that occur to the best of your recollection?

A In August of '68.

Q And what role, if any, did you play in the decision to exercise the right to terminate?

A I recommended that we do so.

Q You talked about a recommendation in 1966. Was there another recommendation in 1968?

A Yes, sir.

Q What was that recommendation?

wpl2 Sweet-direct

A The recommendation was to arrange for another contract for a period of three years at which time it would come to an end for the purpose of enabling Mr. Oreck to get his skin out.

Q I see. Did this recommendation come before or after you and Mr. Sparks met with Mr. Oreck in New Orleans?

A After.

Q And do you recall who brought up the subject of a new agreement for the first time?

A Mr. Oreck.

Q And when did he do that?

A As early as '66.

Q I see. Did he do it in '68?

A Yes, sir.

Q And then you recommended that a new agreement be entered into?

A Yes, sir.

Q And then there was a new agreement entered into, is that correct?

A Yes, sir.

Q To your knowledge was Mr. Oreck represented by counsel at the time the new agreement was entered into?

MR. HOFFMANN: I should say he may --

A Yes, sir.

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wp13 Sweet-direct

MR. HOFFMANN: Oh, let it go, then.

THE WITNESS: Did I do something?

Q In connection with the termination in 1968, do you recall that?

A Yes, sir.

Q Did you have any conversations with anyone at Sears concerning the termination?

A No, sir.

Q Did you have any correspondence with anyone at Sears concerning the termination?

A No, sir.

Q Then you said you recommended the new agreement. Did you have any conversations or correspondence with anyone at Sears concerning the new agreement?

A No, sir.

Q The 1968 agreement?

A No, sir.

Q To your knowledge did Sears have anything to do with the new agreement?

MR. HOFFMANN: I object.

A No, sir.

THE COURT: Overruled.

Q Can I have the answer? Speak up.

A No, sir.

Q To your knowledge did Sears have anything to do with the termination of the 1963 agreement?

A No, sir.

Q Now, while you were -- were you in charge of the Oreck account, so to speak, from this time in 1966 until you retired in late 1968?

A Yes, sir.

Q And did your duties as Mr. Payne's boss, I believe, include pricing of products to be sold by Whirlpool to Oreck?

A Yes, sir.

Q Did you ever have any conversations or correspondence with anybody at Sears concerning the prices that Whirlpool would charge to Oreck?

A No, sir.

Q Did you ever receive any complaints from anyone at Sears concerning Oreck?

A No, sir.

Q Did you ever receive any complaints from anyone at Sears concerning Oreck mail order advertising?

A No, sir.

Q Did you ever have any discussions with anyone at Sears concerning the use of Sears tooling to make private label vacuum cleaners for Oreck Corporation?

A No, sir.

Q Did you ever any any correspondence with anybody at Sears on any of those subjects?

A No, sir.

MR. TUROFF: I have no further questions.

* * *

* * *

Q Did you know anything about the manufacturing of vacuum cleaners before you came to the Whirlpool Company?

A The manufacturing?

Q Yes, of vacuum cleaners.

A No. No, sir.

Q Did you learn anything about that after you came to Whirlpool?

A Yes, sir.

Q Did you have anything to do in your functions with manufacturing?

A Only as regards the scheduling of production and sitting in on engineering meetings and design meetings.

Q And did you in discharging that function have anything to do with the scheduling of production for Sears Roebuck Company?

A Oh, no, sir.

Q You say, "Oh, no, sir." Was there somebody at the Whirlpool Corporation who did that?

A Yes, sir.

Q Who was that person?

A Well, I'm sorry, I can't tell you because I don't know.

Q You mean you don't know the name of your contemporary --

A That's exactly what I mean.

Q I havent finished my question.

A Okay.

Q You don't know the name of your contemporary in the Whirlpool Corporation who had to do with the manufacture of Whirlpool vacuum cleaners for the Sears Roebuck Company, is that right?

A I knew there was such an individual, sir, but he was on an entirely separate floor. I never had any conversation with him.

* * *

wpl9 Sweet-cross

* * *

Q Do you know whether or not Sears was a bigger customer, bought more vacuum cleaners from Whirlpool than did Oreck Corporation?

A Yes, sir.

Q How did you know that?

A I knew that they were a larger customer than the Oreck Corporation because on occasion I would see some figures, shipment figures.

Q Shipment figures from Whirlpool to Sears; is that what you are saying?

A That's right.

Q Did they come to you as a matter of course, those figures?

A On occasion.

Q Well, I ask you as a matter of course, was it a regular matter?

A No, no, regularly, no.

Q Sometimes they came across your desk; is that your testimony?

wp20 Sweet-cross

A Yes, sir.

* * *

* * *

Q Sir, what did you mean when you said you wanted Oreck to come back on the right track? What was meant by that?

A I believe I said that the right track meant for him to develop department store business.

Q Do you know if he was required to develop department store business by force of the relationships between

wp25 Sweet-cross

you and the Oreck Corporation? By "you," of course, I mean the Whirlpool Company.

MR. TUROFF: I object to the form of that question.

THE COURT: Sustained.

Q Do you know of any relation between Whirlpool and Oreck which required him to develop the department store business in the sale of vacuum cleaners?

MR. TUROFF: I object to the form of that question.

THE COURT: I will overrule that one.

What was the basis for your statement, developing department store business?

THE WITNESS: Between Whirlpool and Mr. Oreck, it was decided when we would develop the line for him that his sales would be concentrated through an avenue of distribution such as the department stores in the United States.

Q Do you know when that was decided upon between Whirlpool and Oreck?

A I think '63, sir, I believe.

Q Was it before you had something to do with the Oreck account?

A Yes, sir.

wp26 Sweet-cross

Q And --

A That's why I said, "Get back on the track."

* * *

Q Sir, I show you what has been introduced in evidence as an exhibit here --

MR. HOFFMANN: Is this 26?

MR. AGREE: 26, yes, sir.

MR. HOFFMANN: Plaintiff's Exhibit 26.

Q I ask you if you would be good enough to look at the letter which is the third piece of paper on the exhibit. In fact, you can look at the whole exhibit, if you like,

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but I am going to direct your attention to this letter.

I show you this letter. Here is the letter. Will you please take a look at it?

A (Examining) I have read the June 3rd letter.

Q Yes. Do you see the notation on the bottom?

A Yes, sir, that's my handwriting.

Q Yes.

MR. TUROFF: Your Honor, I am going to object to any questions concerning this exhibit which is way beyond the scope of direct.

MR. HOFFMANN: This has to do with Canada, by the way.

THE COURT: Let me see it.

It is beyond the scope of the direct, is it not?

MR.HOFFMANN: No, your Honor. If you interpret the witness's remark --

THE COURT: I want the reporter to hear. Please step back.

MR. HOFFMANN: The witness testified on direct examination about putting the Oreck Corporation back on the right track of distribution as appears fromthe questions and answers, I think, and I now seek to ask whether that has some bearing on his--

THE COURT: Go ahead.

Q This handwritten notation, sir, that you identified as being in your hand, would you be good enough to follow me as I read it aloud?

"I do not want to get involved at this time with distribution of this product in Canada."

Signed "Sol."

Are you referring to here as the product the vacuum cleaner sold by Oreck Corporation?

A Yes, sir.

Q Tell me, sir, why was it that you didn't wish to get involved at that time with distribution of Oreck vacuum cleaners in Canada, the time of June 3, 1966?

MR. TUROFF: I am going to object, your Honor. It doesn't go to what Mr. Hoffmann said he wanted to ask.

THE COURT: Overruled.

You may answer.

A Would you repeat the question, please?

Q Why was it, sir, as of the time you made this notation that you did not want to get involved with distribution of the product in Canada, that is to say, the Oreck vacuum cleaner in Canada?

A We, in our agreement with Oreck gave him exclusive distribution in the United States and he obviously could sell it anywhere he pleased without having an

exclusive franchise like he did have in the United States. But for the product bearing our name to be sold in Canada, it would have had to go through the Canadian standards, the CSA standards for approval. CSA is similar to Underwriters here.

Q And did you have any reason to suppose it couldn't clear CSA standards?

A Oh, no, it was just the time consuming details that would be involved.

Q Well, your functions had to do with sales, did they not?

A Yes, sir.

Q And weren't you interested in making as many sales as possible for the Whirlpool-made vacuum cleaners?

A Yes, sir.

Q And wasn't the situation at the time one in which Oreck was in effect saying to you, "I would like you to get CSA approval so that we can sell the Whirlpool-made vacuum cleaners in Canada"?

A No, sir.

Q You say "No, sir" to that. What was happening?

A I --

Q You answered my question "No, sir." What was going on? What was it that Oreck was seeking to have you

do?

MR. TUROFF: I object.

THE COURT: Yes, sustained as to form.

A I don't understand.

Q I am trying to understand, Mr. Sweet. A moment ago I understood you to say because of your function in sales you would like to have vacuum cleaners sold. That is correct, is it not?

A Yes, sir.

Q And then I asked you about Oreck selling vacuum cleaners in Canada and you said it would mean CSA approval.

A If they were -- if they were sold under our name.

Q Yes.

A Now, that didn't mean that he couldn't sell them if he wanted to.

Q Under some different name?

A Under the Whirlpool name.

Q Could he --

A But we, the Whirlpool Corporation, would not sell, we wouldn't sell our product unless it was CSA approved.

Q Yes. And then I asked you whether you applied, whether you tried to get such CSA approval?

A No, sir,we did not.

Q Now we are back to where we were. Why was that,

why didn't you?

MR. TUROFF: I object, your Honor. It is way beyond the scope of the direct.

THE COURT: We will go a little bit further. Overruled.

A Because of the time and the necessary detailing that would be required to ask and secure CSA approval.

Q The time, sir, that part of it --

A Yes.

Q -- do you have any idea of how many hours would be involved?

A It isn't hours, sir. It would be weeks or months.

Q When you say weeks or months, you mean some activity taking place over that period of time, or someone devoting full-time for weeks and months to this project?

A They -- CSA doesn't drop everything. If we were to submit a product for approval, they wouldn't stop all ongoing work. We would have to take our place in line in rotation before they got to the product for investigation and checking.

Q So the weeks and months you speak of would be weeks and months of time which would elapse with CSA before any approval was rendered?

A With CSA and with our preparing for the CSA, correct.

* * *

* * *

THE COURT: Mr. Sweet, in substance it was that as a person connected with selling you are interested in making sales, right?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead, sir.

Q What other things are you interested in in your distributor? Would it be that he maintains inventories. Would that be a desirable quality?

A Yes, sir.

Q Would it be that he makes good on warranties? Is that something that you would think desirable?

A Yes, sir.

Q Do you know how Oreck Corporation fared in these rspects that I have just mentioned? First in volume of sales? Did they reach a sales level which you thought was a good one?

MR. TUROFF: I object. It is way beyond the scope.

THE COURT: Overruled.

A No, sir.

Q I show you a letter of March 1, 1968, Plaintiff's Exhibit 19 in evidence. I ask you to read it?

A Yes, sir.

Q How was it by that date, March 1, 1968, when you said "From your letter of February 23 your efforts are starting to pay off?"

Was Oreck Corporation performing satisfactory in respect of the volume of sales?

A No, sir.

Q Hadn't sold enough?

A Yes, sir.

Q How about the situation in respect of inventory? Do you know whether the Oreck Corporation had enough vacuum cleaners in inventory to satisfy you in 1968?

A We had the inventory.

Q Do you know what the situation was in respect of Oreck Corporation?

A No, sir.

Q Your answer is you don't know?

A That is right.

Q How about making good on warranties?

MR. TUROFF: I have to object.

THE COURT: Overruled.

Q Do you know whether Oreck was performing this

branch of its functions in a satisfactory manner, that is to say, satisfactorily making good on warranties?

A So far as I know, yes, sir.

Q So was it then the reason why in 1968 termination of Oreck Corporation was being sought that it didn't maintain a sufficient volume of sales? Is that the reason?

A No, sir.

Q What was the reason.

A I have said it a couple of times.

Q Say it again, please?

A He was not establishing the type of sales outlets that were originally to be the sales program, the sales outlets.

Q You knew in 1967 that he had started in the mail order business, did you not?

A In the mail order business?

Q Did you know anything about that?

A Direct mail?

Q Direct mail?

A Yes.

Q Did you know that he was doing it more intensively doing more intensive direct mailing advertising in '68 than he had before?

A Sir, I don't know the frequency of his direct mails.

Q Was it that he had gone into the mail order business which led to your dissatisfaction with the way he was distributing products?

A Oh, no, we had objected prior to 1967.

Q You objected prior to 1967 for --

A At that time he was not in the direct mail business.

Q When you first objected?

A Right.

Q Now that he was in, was the kind of distribution that you wanted from the Oreck Corporation, via direct mail?

A No, sir.

* * *

* * *

Q How many vacuum cleaners, excluding stick vacuum cleaners of the hand type you are talking about, how many vacuum cleaners has Oreck Corporation sold in 1976 to date?

A I could only guess, if you want me to guess.

Q You don't know?

A I would have to refer to our records.

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ms D. Oreck - direct

Q Do you have those records here?

A No, I don't believe we do.

Q If you were given some time to refer to those records over the recess would you have that information?

A No, I don't believe so. I don't believe that those particular records are in New York. I think they are in New Orleans.

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4-3 Q Have you ever had any executive or administrative functions that pertained to Sears Roebuck?

A I have had functions since 1971 as relates to Sears, but not in the sale of products .

Q Why is that?

A Well, my responsibilities were broadened after I became a group vice-president and a director of the corporation.

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* * *

Q Now, as a result of your conversations with David Oreck in 1963, Whirlpool and Oreck Corporation entered into an agreement? Is that correct?

A Yes, sir.

Q I show you what has been marked as Plaintiff's Exhibit 3 in evidence and I ask you if that is the agreement?

A Yes, sir.

Q Did there come a time, Mr. Sparks, when Whirlpool decided to terminate that agreement?

A Yes, sir.

Q Did you make the decision concerning termination?

A I did.

Q I show you Defendant's Exhibit F in evidence and ask you if that is a copy of the letter you wrote to the Orec- Corporation concerning termination?

MR. AGEE: May we have a copy?

A It is.

(Continued on next page.)

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Tk5 B1 a.m.

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jwds 1 Sparks - direct

Q Did you have conversations with Mr. Sweet prior to sending the letter of termination?

A Yes, sir, he made the recommendation and I accepted it.

Q Would you tell us, sir, what were the reasons why you made the decision or you accepted Mr. Sweet's recommentation to terminate Oreck?

A It was because Oreck Corporation had failed to reach the original objective when we first conceived the program in 1963 which was to set up a one-step distribution system nationally to major accounts on vacuum cleaners with the hopes that ultimately we would have a system that other specialty-type products could go through.

Q Well, didn't he set up another arm of distribution?

A He set up -- yes, sir, he set up another arm of distribution.

Q Wasn't that sufficient reason to keep him on?

A Not in our opinion because it failed to set up a distribution system that we had agreed upon and wanted and we felt it was necessary to the corporation which we don't have to this day, by the way.

Q Were you concerned at that time about competition with Sears-Roebuck?

jwds 2 Sparks - direct

A No, sir, we had no concerns about competition with Sears. In fact, the system we -- the system that we talked about would be in direct competition with Sears.

Q The department store system?

A Yes, the major accounts. They complete with Sears.

Q Now, when you made your decision to terminate Oreck in 1968, did you have any conversations or correspondence on that subject with anyone at Sears?

A No, sir.

Q Did you have any meetings with anybody at Sears on that subject?

A No, sir.

Q What if any part did Sears play in the 1968 termination?

A None whatsoever.

Q At the time you made the decision to terminate Oreck in 1968, had you received any complaints from Sears-Roebuck concerning Oreck Corporation?

A No, sir, I did not.

Q Had you received any complaints from Sears-Roebuck concerning Oreck Corporation being in the direct mail business when you made this decision?

A No, sir, I did not.

jwds 3 Sparks - direct 1431

Q Were you ever asked by Sears not to use its tools to make private label vacuum cleaners for Oreck?

A No, sir.

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Q Now, I call your attention to paragraph numbered 1 of Exhibit 44.

THE COURT: Just so the record is clear, this question of what is being said up and down the chain of

Whirlpool Corporation regarding certain matters of the complaint opens the door to testimony within the Whirlpool Corporation as to what they in fact were saying. I have admitted it, therefore, for that reason.

It has been the subject of testimony on the plaintiff's case thereby making this evidence admissible on that particular subject matter.

All right. Go ahead.

Q Do you see paragraph 1 there?

A Yes, sir.

Q Paragraph 1 provides an expiration date for that agreement, does it not?

A Yes, sir, it does.

Q And there is no provision for renewal in paragraph 1, is there?

A That's correct.

Q Did you have any part in setting that term in the agreement?

A Yes, sir, I did.

Q Can you tell us why that term was inserted?

A Because we wanted a definite conclusion date in our relationship with the Oreck Corporation, and originally he requested through, I believe, August of '71. He later came back and asked if we would extend it through

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jwds Sparks - direct

December 31st of '71 because he wanted to take advantage of the Christmas selling season, and we agreed. But we wanted a termination date in this agreement.

Q Now, there came a time in 1971 when that agreement expired?

A Yes, sir.

Q Did you have any conversations or correspondence with anyone at Sears just before or when you entered into that agreement, which is Exhibit 44?

A No, sir.

Q Did you have any meeting with Sears on that subject?

A No, sir.

Q As to Sears permission?

A No, sir.

Q And when the agreement expired, did you have any conversations with Sears with regard to that subject?

A No, sir.

Q Did you have any correspondence with them?

A No, sir.

Q Did you have any meetings with them?

A No, sir.

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Did you ever have any conversation with anyone at Sears concerning making private label vacuum cleaners for Oreck?

A No, sir.

Q Did you have any correspondence with anyone on that subject?

A No.

Q Did you ever have any responsibility with regard to the prices Whirlpool charged to Oreck for vacuum cleaners?

A Yes, I reviewed prices.

Q At what period of time?

A After it had been put together by the people

responsible on the account, then I would review it.

Q During what period of time? From what years to what years?

A 1963 to 1966.

Q Were you the man who ultimately set the price?

A During that period?

Q Yes.

A I reviewed and agreed to the price, yes.

Q In connection with that review and agreement of the price did you have any conversations with anybody at Sears or any correspondence with anyone at Sears concerning the price?

A No, sir.

Q Mr. Sparks, did you have any discussions with anybody at Sears concerning Oreck's selling in Canada?

A No, sir.

Q Did you ever have any correspondence on that subject?

A No, sir.

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Q Sir, in connection with what has been called the Stroop report, did I understand that you said as to that matter that you cannot recall that he even had to do with vacuum cleaners? Is that your testimony about Mr. Stroop?

A Right.

Q And in answer to a question which was couched this way, "Do you know why he wrote it, if he wrote it?" Your answer was, "I don't know."

Is that correct?

A Yes, sir.

Q Now, sir, in talking about the employment history of Mr. Stroop in Whirlpool, do you know what he was promoted

to in 1964? What function?

A I can't recall specifically, no.

Q If I supply the information to you that he was named to the new positon of general manager of merchandising, does that serve to jog your recollection?

A Yes, yes.

Q And in that capacity as general manager of merchandising do you know what his functions were, what he was responsible for doing?

A Yes, sir, advertising and sales promotion.

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Q Now, sir, in 1963, according to the testimony of Mr. David Oreck, you handed over to him Exhibit 160, which is entitled "Appraisal of Vacuum Cleaner Business, RCA-Whirlpool," and bears a date in '61 "By H. Thomas Stroop."

If I understood correctly, your testimony on direct examination was "I can't recall that I gave it to David Oreck," is that correct?

A Yes, sir.

Q Now, does that mean you have no recollection about it?

A I have no recollection whatsoever about it.

Q And that goes both ways, does it not, you don't recall anything about it at all, whether or not you gave it to Mr. Oreck? Is that correct?

A I don't recall it.

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Q Well, sir, did the volume, for example, of sales which you had to Sears, was that a circumstance which you felt at that time made your job easier?

A I can't answer that. I don't know what that question means, makes my job easier.

Q How about cost advantages? Were there any

relating to your selling in volume to Sears?

MR. TUROFF: Your Honor, I have to object. It has nothing to do with direct and it has nothing to do with the case?

THE COURT: I will overrule the objection.

Q Does greater volume of sales result in lower cost, Mr. Sparks, in your experience in selling vacuum cleaners?

A Selling vacuum cleaners?

Q Yes.

THE COURT: Does it lower costs of manufacture is what you are being asked.

THE WITNESS: Yes.

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Q Sir, did you know who in the year 1963 was in charge of the matter of dealing between Whirlpool and Sears concerning the sale of vacuum cleaners by Whirlpool

to Sears?

A In 1963? I can't recall that.

Q I give you the name Bob Upton?

A He had the overall Sears responsibility, not just the vacuum cleaner.

Q But it included vacuum cleaners?

A I don't know. I don't recall that part.

Q You just said he had the overall Sears responsibility. Are you suggesting there was some limitation to the overall responsibility?

A I am not suggesting anything. I don't know if that included vacuum cleaners. You asked me if it included vacuum cleaners. I don't know.

Q Do you know, sir, who was in charge of dealing with Sears concerning vacuum cleaners in that year?

A I do not recall.

Q Can you recall for any year in 1963 through 1971?

A Yes, I can recall most recent years.

Q My question was through 1971?

A Through 1971?

Q Yes.

A There were two gentlemen that I can recall who were general managers of the St. Paul division, Jim Bourquin

and Lowell Holden, and they had the responsibility for that division which made the vacuum cleaners for Sears, and their responsibility included manufacture and sales.

Q They were responsible both for manufacture and sales? Is that what you are saying?

A Yes.

Q Was there not a sales official responsible for the sales account?

A There were individuals who worked for these gentlemen who worked on day-to-day responsibility; the final responsibility rested with the manager of the division.

Q And not with the vice-president?

A No, sir .

Q Well, tell me this:

At the time when you said that Bob Upton had overall responsibility, were you referring to overall responsibility concerning manufacture of products sold by Whirlpool to Sears Roebuck?

A His position was as the officer in charge of Sears' relations.

Q Can you tell us what that means, Sears' relations?

A He maintained contact with Sears overall to make

sure that the relations remain.

Q Would you use the word good?

A Good and compatible and that Sears is getting the proper service from the various divisions.

Q Do you know where Bob Upton came from before he served with Whirlpool?

A Well, his father found Whirlpool Corporation .

Q Was his father Lou Upton?

A Yes, sir.

Q Do you know where Bob Upton had been prior to coming to the Whirlpool Corporation?

MR. TUROFF: I am going to object.

THE COURT: Sustained.

Q Do you know whether he had worked for Sears Roebuck prior to that?

MR. TUROFF: I am going to object again.

THE COURT: Let us get an answer.

Do you know?

THE WITNESS: I don't know that he worked for Sears Roebuck; I don't know that he worked for them.

Q Did you ever hear Bob Upton say in words or in meaning, "My job is to keep reminding everyone around here that Sears is a customer"?

MR. TUROFF: I object.

THE COURT: Overruled.

A I don't recall those specific words, but that is his responsibility; it is a description of what he is supposed to do, yes.

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Q You were asked by counsel on direct examination whether to your knowledge Sears had anything to do with the termination.

Do you remember that question being put to you?

A Yes.

Q And your answer was no? Isn't that right, that it didn't?

A Yes, sir.

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Q Mr. Sparks, did I understand you correctly to say that you never complained about the Oreck Corporation going into the mail-order business.

MR. TUROFF: I object. I don't believe the witness ever said that.

THE COURT: Let's see what his answer is. Overruled.

A I don't recall I ever said that.

Q But is that so, did you ever complain about it?

A Complain -- I had discussions with Mr. Oreck about it.

Q Did you tell him that it was a mistake for him to go into the mail-order business?

A It was a mistake in the sense that it was taking us completely away from where we originally said we wanted to go.

Q The answer to my question is yes, is that right, you said it was a mistake?

A It was a mistake.

Q And when did you tell him this?

A I can't recall.

Q I put it to you thatyou told him in 1968. Would that serve to refresh your recollection?

A I met with Mr. Oreck in 1968 and at that time of our meeting I told him that I was disappointed in the direction that we had taken and that we didn't accomplish our original objectives. So in that sense I could have said it's a mistake.

Q You did in fact, did you not, say it was a mistake to Mr. DAvid Oreck?

A I can't recall I used those words.

* * *

Q Mr. Sparks do you recall having been examined by me in a deposition taken on May 22, 1974 at my law offices

in New York?

A Yes, sir.

Q And on page 216, line 23, I put this question to you:

"Q What was the position taken concerning Oreck's mail-order business by you in these conversations?

"A I expressed my opinion that it was a form of distribution that had not been considered in our original negotiations and was completely away from what we talked about."

And then line 14 on that page:

"Q Without any recommendation for action or for stopping action?

"A No, I said it was a mistake."

Do you recall having given this testimony?

A Yes, sir.

Q And then I asked you the following question, line 15, page 217:

"Q You speaking for Whirlpool, the supplier of vacuum cleaners to Oreck Corporation, which is the distributor for the vacuum cleaner, said to Oreck Corporation you thought it was a mistake to sell by mail-order, is that it?

"A Yes."

Does this serve to make you recall what happened?

A Yes, sir.

Q And you testified truthfully, of course, at the time, did you not?

A Yes, sir.

Q Now, one more and I will be through.

On page 222 of your deposition taken the same day:

"Q Mr. Sparks, tell us as best you can what you learned at Whirlpool concerning what passed between Mr. Sweet and Mr. Oreck concerning the subject matter of mail-order business.

"A As I recall, Mr. Sweet had conversations" --

MR. TUROFF: I object to that,your Honor. Now we are talking about somebody else's conversation.

MR. HOFFMANN: No, we are talking about what the witness testified to.

MR. TUROFF: About his conversation with someone --

MR. HOFFMANN: Just before that I asked him if he knew what Sweet had to say.

MR. TUROFF: Maybe I didn't hear the question.

MR. HOFFMANN: Just before I used this transcript I asked him if he knew about what Mr. Sweet had to say and he did not.

Q "A: As I recall, Mr. Sweet had conversations with me and reported conversations he had with Mr. Oreck, wherein he advised Mr. Oreck much along the lines that I did previously."

Do you remember that, sir?

A Yes, sir.

Q And does that serve to bring into your active recollection that Mr. Sweet, in effect, said the same thing about Oreck's going into the mail-order business that you did?

MR. TUROFF: I object to questioning this witness about that. The question is what Mr. Sweet said to Mr. Oreck.

THE COURT: I take it you don't by that mean to get down whether he was there, but this is what Mr. Sweet reported to him, is that right?

MR. HOFFMANN: Precisely, yes, your Honor.

A Yes, that's what Mr. Sweet reported to me.

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Q Mr. Boyar, by whom are you employed?

A Sears Roebuck & Company, New York corporation.

Q What is your position at Sears Roebuck & Company?

A Vice-president in charge of affiliated factory relations.

Q Are you also a director of Sears Roebuck & Company

A Yes, sir, since 1967.

Q Are you a director of Whirlpool Corporation?

A Yes, sir.

Q Would you kindly speak up just a little bit so everybody can hear you?

A Yes, sir, sure.

Q Would you give us just a brief rundown, Mr. Boyar, of your work experience at Sears?

A Well, after graduation from school I went to work in a retail store as a clerk, worked in the retail store for a few years, and then was promoted to what we call the parent department, the plumbing department, worked in sales, worked in buying and merchandise development and was there from 1937 to 1946.

From '46 to 1952 I was a buyer of refrigerators, air conditioners.

From 1952 to 1965 I was what we call the national merchandise manager of the laundry division.

And in 1965 I was promoted to the present position I enjoy today.

Q Now, in the first position that you have with regard to factories, do you have any sales functions?

A No, none at all.

Q When did you become a member of the Whirlpool board of directors?

A 1965, if my memory serves me correctly.

Q Do you hold any other office or position at Whirlpool other than being a director?

A No, strictly a director.

Q Mr. Boyar, did you at any time have any conversations or correspondence with anyone at Whirlpool concerning making private label vacuum cleaners for Oreck

Corporation?

A No, I don't get involved in that.

Q Did you ever have any correspondence or conversations with anybody at Whirlpool concerning whether or not Whirlpool should enter into a distribution agreement with Oreck Corporation?

A No, sir.

Q Did you ever have any correspondence or conversations with anybody at Whirlpool as to whether or not the distribution agreement between Whirlpool and Oreck should be terminated?

A No, sir.

Q Did you ever have any correspondence or conversations with anyone at Whirlpool concerning whether the distribution agreement between Whirlpool and Oreck should be allowed to expire by its terms on December 31, 1971?

A No,sir.

Q Did you ever have any conversation or correspondence with anyone at Whirlpool concerning Oreck being in the direct mail business?

A No, sir.

Q Did you ever have any correspondence with Whirlpool by which you complained about Oreck?

A Say that again now?

Q Did you ever have any correspondence or conversation with anyone at Whirlpool in which you made a complaint about Oreck?

A No, I had no particular conversation. I received a complaint -- not a complaint, but a man by the name of Mr. Barker, who was an honorary director of Sears, a man about 84 years old, had received an Oreck circular and he pointed it out to me and he said to me, "This is a schlocky presentation of the Whirlpool emblem. Do you know anything about it?"

And I said, "I know nothing about it, I will send it to Whirlpool." and that's where it ended up.

Q And did you ask Whirlpool to take any action with regard to the mailer?

A Absolutely not.

Q Do you recall about when this incident concerning Mr. Barker occurred?

A Mr. Barker has been dead about two years now, so I would guess it would have to be '71, '72, somewhere in that area.

Q Did you ever have any conversation or correspondence with anybody at Whirlpool concerning a Parcel Post carton for Oreck Corporation?

A No.

Q Did you ever have any conversation or correspondence

with anyone at Whirlpool Corporation concerning Oreck's desires to market in Canada?

A No, sir.

Q Now, I take it as a director of Whirlpool you attend directors meetings from time to time?

A Yes, sir, six a year.

Q At any time during those meetings have you had occasion to discuss Oreck Corporation?

A No, sir.

Q To your knowledge has it ever been discussed at the board of directors when you were present?

A No, sir.

Q Has the subject matter of Oreck Corporation ever been discussed at a Sears board meeting when you were present

A Absolutely not.

* * *

Q Mr. Boyar, do you remember every business conversation you have had since the year 1963?

A Every business --

Q Yes, conversation.

A Well, as best a person can remember.

Q Do you think it is possible that you could remembo them all?

A If they were important, I would.

Q Since 1963?

A Even further back if they were important.

Q Could you tell me one important business conversation which you participated in the year 1963?

A 1963? That was prior to my present job. I was in the laundry department and we had to make decisions regarding the design of the equipment. That was a very important decision.

Q Could you describe any one conversation taking place that year between yourself and someone else mentioning who the people were and where the conversation took place -- the conversation, of course, being of a business kind?

* * *

A I am spending my entire life in business.

Every conversation I have within business is a conversation. As to the specific people or as to the specific timing, I think you will agree that it is impossible, that very few people can answer a question of that nature.

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Q Mr. Smith, by whom are you employed?

A Sears Roebuck & Company.

Q How long have you been so meployed?

A 30 years.

Q What is your present position at Sears Roebuck & Company?

A Buyer of vacuum cleaners.

Q How long have you been the buyer of vacuum cleaners at Sears Roebuck & Company?

A Approximately ten and a half years.

Q Would that be --

A October 6, 1965.

Q And before that what was your position at Sears?

A Two years previous to that I bought summer furniture.

Q Good experience for buying vacuum cleaners?

MR. HOFFMANN: No objection, your Honor.

Q Now, as buyer of vacuum cleaners since October, 1965,

what are your duties in general?

A Merchandising the vacuum cleaner for the entire Sears system, setting up source of supply, setting up deliveries, inventories, arranging for the production, costing, featuring, in general, merchandising the line.

Q Do Sears vacuum cleaner purchases for its operations in the entire United States come within the purview of your responsibility?

A Yes, sir.

Q You are the national buyer?

A Yes, sir.

Q Now, sir, did you ever have a conversation or correspondence with anybody at Whirlpool concerning Whirlpool's making a private label vacuum cleaner to be sold through the Oreck Corporation to entities such as Rexair or Airway or entities of that sort?

A No, sir.

Q Did you ever have a conversation with anyone at Whirlpool concerning Oreck's being in the direct mail business?

A No, sir.

Q Did you ever have a conversation or correspondence with anybody at Whirlpool concerning Whirlpool's entering into a distribution agreement with the Oreck Cor-

poration?

A No, sir.

Q Did you ever have a conversation or correspondence with anybody at Whirlpool concerning Whirlpool's decision to terminate the distributorship with Oreck in 1968?

A Yes, sir.

Q When did you have that conversation?

A About six months prior to when I was given to understand the agreement was terminated.

Q Will you place the year for us?

A 1971.

Q Was that a conversation or a letter of correspondence?

A Conversation.

Q With whom did you have the conversation?

A George Waterburg and John Vandermier.

Q Who are George Waterburg and John Vandermier?

A George Waterburg was director of the floor care sales at Sears on the Whirlpool and John Vandermier was his assistant in charge of production planning of the Sears line.

Q Was anyone else present besides those gentlemen?

A No, sir.

Q Where did the discussion take place?

A As I recall, it was in my office.

Q Where is your office?

A At that time it was at --

Q In what city?

A In Chicago.

Q To the best of your recollection what did you say to them and what did they say to you?

A Well, it was the occasion of my getting from them the costs that we would be using for the third quarter of 1971, and in going ahead in our discussions of costs they indicated that the Oreck production at St. Paul would be terminated and that the burden to be put on our vacuum cleaners would be going up as a result of it.

Q What do you mean by burden?

A Well, the factory burden, all of the costs that are not directly the result of the item. The item that you are producing has so much material, labor in it. You can measure that thing exact. But you still have to have to have a factory that you are paying the light, the janitorial services, and all that sort of cost is the burden which has to be spread over the individual costs, the individual item.

Q Was anything else said concerning Oreck on that occasion?

A No.

Q Did you have any other conversations with anybody at Whirlpool concerning Oreck's termination or expiration?

A No.

Q Did you ever have any discussions or conversations or correspondence with anyone at Whirlpool concerning Oreck's desires to market in Canada?

A No.

Q Did you ever have any correspondence or conversations with anyone at Whirlpool concerning a parcel post package for Oreck Corporation?

A No, sir.

Q Did you ever have any correspondence or conversations with anyone at Whirlpool concerning the prices charged by Whirlpool to Oreck for vacuum cleaners?

A No, sir.

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Q Mr. Smith, you referred to a conversation which took place in your office in Chicago about six months before the termination? Is that the way you identified the time?

A Yes, sir.

Q Is that some time in early 1971?

A Yes, sir.

Q Now, had you ever had any prior conversations with George Waterburg or John Vandermier concerning the

impact of selling to Oreck or not selling to Oreck on Sears Roebuck?

A No, sir.

Q This was the only time?

A Yes, sir.

Q Who instituted the conversation? Did it come about at your request?

A No, sir.

Q Tell us as best you recall how th conversation came to happen?

A It came about as part of a discussion of what might be happening to our costs. Weh we have a costing session we usually have discussion on what is happening to tne commodity market, whether the cost of copper is going up or down, what is happening to the plastics market, so that we keep informed as to where our costs might be in the future at various time.

Q In that regard reference was made to the fact that Oreck was going to be terminated? Is that what you said?

A Yes, sir.

Q Then you also said that "The burden would be put on us," if I understood your language correctly?

A Yes, sir.

Q Are you suggesting by that testimony that when Oreck no longer would buy from the Whirlpool Corporation, that would impose some obligation on Sears Roebuck to pay more for the vacuum cleaner than it had paid before?

A Yes, sir.

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Q Did you not say that "The burden was put on us" in your direct examination?

THE COURT: He did. I think we all heard it, and he gave an explanation of that.

Q The explanation was, was it not, Mr. Witness, that it included all costs, factory costs that had to be spread, that there would be an increase to Sears Roebuck? Wasn't that the sense of what you said?

A That is what I said, yes, sir.

* * *

Q Well, sir, is it, in fact, true and do you know it to be true that after December 31, 1971, the cost to Sears Roebuck for Whirlpool made vacuum cleaners increased?

MR. TUROFF: Objection.

THE COURT: Overruled.

A Insofar as the burden was concerned -- as a matter of fact, I don't believe they did go up.

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Q Where do you reside, Mr. Steeb?

A St. Joseph, Michigan.

Q By whom are you employed?

A Whirlpool Corporation.

Q How long have you been employed by Whirlpool?

A 24 years today.

Q What is your position at Whirlpool?

A I am director of the special markets department.

Q What are your duties as director of the special markets department?

A I am responsible for three departments:

The commercial refrigeration department, the OEM sales department and the premium sales department.

Q Do any of those departments have anything to do with selling products to Sears Roebuck & Company?

A No, sir.

Q Now, would you give us a brief rundown, just very briefly, of your work experience with Whirlpool?

A I began in 1952 at La Porte, Indiana.

I transferred to the St. Joseph, Michigan Division in 1954. I was a foreman on the assembly line.

I went into the International Division in 1957.

And in 1969 I went into the contract sales division, and then in 1972, as I indicated, the special markets department.

Q At any time during your employment at Whirlpool, did you have anything to do with the Oreck vacuum cleaner account?

A Yes.

Q At what period of time did you have anything to do with that account?

A The period from late 1969 until 1971.

Q What was your title in 1969 when Oreck came within the purview of your responsibility?

A I was appointed to the title of general manager, contract sales.

(Continued on next page.)

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Q Was the Oreck Corporation the only responsibility you had in that?

A No, sir.

Q Did you have anybody working under you with regard to the Oreck account?

A Yes.

Q Who was that?

A John Payne.

Q So you were Mr. Payne's boss?

A Yes.

Q Now, Mr. Steeb, did you at any time have any conversations or correspondence with anybody at Sears concerning using Sears' tools to make a private label vacuum cleaner for the Oreck Corporation?

A No, sir.

Q Did you at any time have any conversation or correspondence with anyone at Sears concerning Oreck being in the direct mail business?

A No, sir.

Q Did you at any time have any conversation or correspondence with anyone at Sears concerning Oreck's desire to sell in Canada?

A No, sir.

Q Did you ever have any correspondence or con-

versation with anyone at Sears concerning the prices charged by Whirlpool to Oreck for vacuum cleaners?

A No, sir.

Q By the way, did you ever have any responsibility for setting the prices that Whirlpool charged to Oreck for vacuum cleaners?

A Yes.

Q When you did so did you have any consultation with Sears?

A No, sir.

Q Did you ever have any conversation or correspondence with anybody at Sears at which time there was any complaint about Oreck being in the vacuum cleaner business?

A No, sir.

Q Did you ever have any correspondence or conversation with anybody at Sears concerning whether Whirlpool should enter into a distribution agreement with the Oreck Corporation?

A No.

Q Did you ever have any conversation or correspondence with anyone at Sears concerning whether Whirlpool should terminate the distribution agreement?

A No.

Q Did you ever have any conversation or correspondence with anyone at Sears concerning whether or not the distribution agreement should be allowed to expire by its own terms?

A No.

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Q Mr. Steeb, you say that you never spoke with Sears Roebuck Company concerning this matter of termination of the Oreck Corporation?

A That is correct, sir.

Q Did you ever speak with Sears Roebuck concerning any business transaction involving Whirlpool and Sears Roebuck?

A No, sir.

MR. TUROFF: I object to that.

THE COURT: He has answered.

Q It is not surprising, then, that you would not speak about this matter since you have not spoken about any

business matter with Sears Roebuck?

A That is correct.

Q Mr. Steeb, who is Robert Upton? Do you know Robert Upton?

A Yes, sir.

Q How long have you known him?

A Approximately 15 years.

Q Do you know what he did before he came to the Whirlpool Corporation?

A No, sir.

Q Have you known Upton well over these 15 years?

A Yes, sir.

Q Socially, as well as in a business way?

A Yes, sir.

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Q Among your denials, as I understand it, in your direct examination there was a denial that you had anything to do with Sears Roebuck concerning the matter of Oreck's not selling in Canada? Is that correct?

A I dont recall that I said that.

Q Is that the fact?

A Oreck could have sold in Canada, no question.

Q I show you what is in evidence as Plaintiff's Exhibit 37. Do you see this last sentence? It is a Western Union telegram from Payne to you?

A Yes.

Q "Per your instructions I have notified my customer that we are unable to waive franchise to permit Canadian market."

Do you hold to your testimony that there was no

reason why Oreck Corporation could not sell in Canada?

A Yes, sir.

Q What were the instructions you gave to Mr. Payne?

A I told John Payne to hold the matter of CSA approval in abeyance.

Q Did you say why you were doing that?

A Why?

Q Why were you doing that?

A I had a conversation with John Inglis Company, Ltd. advising them that there was a possibility there would be a second Whirlpool brand in Canada. I talked to Mr. Madd who was president of the company. They were distributing Whirlpool brand product at that time in Canada, commercial ice makers. They were considering other products, Mr. Madden indicated to me that he might want to distribute Whirlpool vacuum cleaners in Canada. I said to him, "Fine."

He said, "Give me some time."

I said, "Fine. I will do that."

I called John Payne and I said, "John, hold the matter of CSA approval in abeyance because if we are going to have to do it, let us do it for two brands, two different customers, instead of one because of time and money in-

volved." That is what I told John Payne.

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Q Did Whirlpool go after getting a CSA approval for Whirlpool to sell its products in Canada?

MR. TUROFF: I object again, your Honor. It is way beyond direct.

MR. HOFFMANN: Your Honor, you have my assurance only two or three more questions.

THE COURT: Overruled.

THE WITNESS: Would you repeat the question?

THE COURT: The question was whether CSA approval was gotteb.

A It was not.

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Q Mr. Steeb, Mr. Payne during the period when you were his supervisory officer was the man who dealt regularly with Oreck Company, isn't that so?

A Yes.

* * *

Q And he had the most contact with Oreck, did he not, of anyone in the organization, isn't that so?

A Yes.

Q Far more than you, isn't that so?

A Yes.

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RECROSS EXAMINATION

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BY MR. HOFFMANN:

Q If you don't know the answer to Mr. Turoff's question, from the annual report of Whirlpool, "John Inglis Company, Limited our 43 per cent owned appliance manufacturing affiliate in Canada, also achieved significan gains in sales and earnings in '72."

Does that serve to jog your recollection as to the relationship between Whirlpool and John Inglis Company?

A If that's the case, I assume it is.

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Q Mr. Danhauer, I will ask you to keep your voice up so everybody in the courtroom can hear you.

A Yes.

Q Where do you reside?

A 274 Haddon Place, Addison, Illinois.

Q By whom are you employed?

A Sears Roebuck & Company.

Q How long have you been employed by Sears Roebuck & Company?

A 27 years.

Q Will you give us a brief rundown of your work experience at Sears?

A I started working for Sears when I was going to college in Denver as a part-time employee and I gained full employment at the Chicago State Street store in 1949.

I moved into a parent buying organization in 1950.

I became assistant sales manager, a buyer.

I went from there to a staff department.

I was national sales manager of the business equipment department.

I was a buyer of vacuum cleaners.

I was a buyer of student slacks.

I was a buyer of women's fashion shoes.

I was national merchandise manager of vacuum cleaners and sewing machines.

And I am currently national merchandise manager of the home entertainment department.

Q Please keep your voice up a little more. I am having trouble hearing you.

I think you said at one point you were the buyer of vacuum cleaners?

A Yes, sir.

Q When was that?

A 1963, I believe.

Q From 1963 until what point?

A About 1966.

Q What happened in 1966?

A In 1966 I was promoted to sales manager of the house equipment department.

Q How long did you stay in that position?

A One year.

Q Where did you go from there?

A I went to -- I was a staff manager in the general merchandise office.

Q When did you become national merchandise manager of the home entertainment deparment?

A In 1969.

Q I take it that being national merchandise manager for floor care is for lack of a better word a higher position than being a buyer of vacuum cleaners?

A Absolutely.

Q Does the buyer of vacuum cleaners report to you as national merchandise manager?

A Yes, sir.

Q As national merchandise manager, do your duties include anything other than vacuum cleaners?

A Sewing machines, accessories, floor care products.

Q Now, Mr. Danhauer, I ask you whether at any time you had any conversations or correspondence with anyone at Whirlpool concerning the use of Sears tools to make private label vacuum cleaners for Oreck Corporation?

A Yes.

Q And when did you have that conversation?

A When I was a buyer I was asked whether Oreck

could use our tools.

Q When was this?

A Probably in '63.

Q And did you give permission to use the tools?

A Yes, sir.

Q Other than that conversation, did you ever have any other conversations or correspondence with anybody at Whirlpool concerning the use of Sears tools to make private label vacuum cleaners for Oreck? And by that, when I say, "private label," I mean vacuum cleaners not bearing the Whirlpool name.

A Absolutely not.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning Oreck being in the direct mail business?

A No, sir.

Q Did you ever make any complaints to anyone at Whirlpool concerning Oreck being in the direct mail business?

A No, sir.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning Oreck's desire to market in Canada?

A No, sir.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning a parcel post package for Oreck?

A No, sir.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning whether or not Whirlpool should enter into a distribution agreement with Oreck Corporation?

A No, sir.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning whether Whirlpool should terminate that distributorship agreement?

A No, sir.

Q Did you ever have any correspondence or conversation with anyone at Whirlpool concerning whether the distributorship agreement should be allowed to expire by its own terms?

A No, sir.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning the prices charged by Whirlpool to Oreck for vacuum cleaners?

A Absolutely not.

Q Did you ever make any complaint to Whirlpool, written or oral, about Oreck being in the vacuum cleaner

business?

A No.

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Q Mr. Harper, may I please ask you to keep your voice up so everybody in the courtroom can hear.

In what city do you reside, Mr. Harper?

A I reside in -- my offices are in New York.

Q And by whom are you employed?

A Sears Roebuck & Company.

Q What is your position at Sears Roebuck & Company?

A I am corporate vice-president and general manager of their New York office.

Q How long have you been employed by Sears Roebuck & Company?

A 29 years.

Q And would you just very briefly tell us what your work experience at Sears has been?

A Well, I started 29 years ago in Chicago as a stock boy and then I was promoted to the shipping dock and from that point I have been a salesman and kind of on up and down the line.

I have had a variety of assignmengs within Sears.

Q Did you at any time during your tenure at Sears have anything to do with vacuum cleaners?

A Yes, I did.

Q And when was that?

A In 1965 to 1969.

Q And what was your position between 1965 and 1969?

A Well, my title was natinal merchandise manager of floor care and sewing machines and I was responsible for that segment of the business.

Q And --

MR. HOFFMANN: Your Honor, could the witness be asked to please raise his voice a little?

MR. TUROFF: Please, we are having difficulty.

THE COURT: It is hard to hear you.

THE WITNESS: I am sorry, excuse me.

Q And did the buyer of vacuum cleaners report to you at that time?

A Yes, he did.

Q And were you succeeded in that positon by M.r Danhauer?

A Yes, I was. He was, excuse me.

Q He succeeded you?

A That is correct.

Q Now, Mr. Harper, have you at any time had any conversations or correspondence with anybody at Whirlpool concerning Sears owning tooling to make a private label vacuum cleaner for Oreck Corporation?

A No.

Q Please hold your voice up a little bit.

A All right. The answer is no.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning Oreck Corporation being in the direct mail business?

A No.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning the prices charged by Whirlpool to Oreck for vacuum cleaners sold to Oreck?

A No.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning Oreck's desire to market in Canada?

A No.

Q Did you ever have any correspondence or conversations with anyone at Whirlpool concerning a parcel post package for Oreck Corporation?

A No.

Q Did you ever have any correspondence or conversations with anyone at Whirlpool concerning the subject of whether or not Whirlpool Corporation should enter into a distribution agreement with Oreck Corporation?

A No.

Q Did you ever have any correspondence or conversations with anybody at Whirlpool concerning whether or not the distribution contract with Oreck Corporation should be terminated?

A No.

Q Did you ever have any conversations or correspondence with anybody at Whirlpool concerning whether or not the distribution contract should be allowed to expire by its own terms?

A No.

Q Did you at any time ever make any claim to the Whirlpool Corporation about the Oreck Corporation being in the vacuum cleaner business?

A No.

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Q In respect of the matter of placing orders for floor care products, that is to say, choosing the manufacturers from whom to buy, was that also in your supervisory power?

A Yes, I would have to say there was some influence there, but I should tell you that Sears is a company that believes that a strong level of continuity from sources. We don't flit from place to place; we believe in a strong element of continuity in on-going relation with people.

Q There had been continuity with Whirlpool prior to your taking over in 1965 in this function?

A Yes.

Q Do you know how long back it went?

A No, I can't give you a precise date. I have the impression that it was more than a few years.

Q Half a century or so?

A Not in this line, no.

Q Not in vacuum cleaners?

A No.

Q How about with Whirlpool, my question was?

A As a company we were long associated with Whirl-

pool.

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Q Where do you reside, Mr. Whitman?

A In St. Joseph, Michigan.

Q By whom are you employed?

A Whirlpool Corporation.

Q How long have you been employed by the Whirlpool Corporation?

A About 19-1/2 years.

Q Would you give us a brief rundown of your history at the Whirlpool Corporation?

A Well, I joined Whirlpool in 1956 in engineering, Marion Division in Ohio, and I was in the engineering assignments until 1960. In 1960 I went into sales to Sears, product manager of the Kenmore automatic washer and

drier; then in 1964 I went into the International Division as manager of operations; in 1966 I went into the Physical Distribution Division for a year, and in 1967, approximately April, I went up to St. Paul in charge of the sales to Sears on vacuum cleaners; then I held that assignment until October, 1970, and then I came down to handle the laundry sales to Sears again, and until last August I handled that assignment, and since last August I have handled the business planning for the laundry group.

Q Does the laundry group include vacuum cleaners?

A No.

Q Where is the laundry group located?

A It is headquartered in St. Joseph, Michigan.

Q In your function in sales to Sears on vacuum cleaners, which I believe you said you assumed in 1967, what were your duties in general?

A Well, it was my function to take care of all the product planning, the production scheduling, the pricing and the costing to Sears Roebuck on its line of vacuum cleaners.

Q Did that require you in deal with the Sears buyer?

A Oh, yes.

Q Who was the buyer at that time?

A Tom Smith.

Q Would it be fair to say that you were the man who was the most direct contact during that period with the Sears buying department concerning vacuum cleaners?

A That was my complete responsibility.

Q Now, sir, did you at any time have any conversation or any correspondence with anybody at Sears concerning the use of Sears tools to make private label vacuum cleaners for your corporation? By that I mean, vacuum cleaners not bearing the Whirlpool name?

A Yes.

Q And when did you have such a conversation?

A I was asked to check up on whether, in fact, our accounting department was crediting the tooling account, the tooling account with the agreed upon price that Oreck was to pay to Sears Roebuck.

Q Did you do that checking?

A Yes.

Q Who asked you to do that checking?

A The buyer.

Q Who was that?

A Tom Smith.

Q Then did you report to Mr. Smith?

A Yes, I told him it was being credited to their

tooling account as per agreement.

Q Did you have any other conversations or correspondence with anyone at Sears concerning making a private label vacuum cleaner for Oreck?

A No.

Q Did you ever have any other conversations or correspondence with anybody at Sears concerning the use of Sears tooling to make private label vacuum cleaners for Oreck?

A No.

Q Did you have any conversations or correspondence with anybody at Sears concerning Oreck being in the direct mail business?

A No.

Q Did you ever have any complaints from anyone at Sears concerning Oreck being in the direct mail business?

A No.

Q Did you ever have any conversations or correspondence with anybody at Sears concerning Oreck's desire to market in Canada?

A No.

Q Did you ever have any conversation or correspondence with anybody at Sears concerning a Parcel Post package for the Oreck Corporation?

A No.

Q Did you ever have any conversations or correspondence with anybody at Sears concerning prices at which Whirlpool would sell vacuum cleaners to the Oreck Corporation?

A Absolutely not.

Q Did you ever have any conversations or correspondence with anybody at Sears as to whether or not Whirlpool should enter into a distribution contract with the Oreck Corporation?

A No.

Q Did you ever have any conversations or correspondence with anybody at Sears as to whether Whirlpool should terminate the distribution contract with Oreck Corporation?

A No.

Q Did you ever have any conversations or correspondence with anybody at Sears concerning whether or not Whirlpool's distribution contract with the Oreck Corporation should be allowed to expire by its own terms?

A No.

Q Did you ever receive any complaints from Sears about Oreck being in the vacuum cleaner business?

A No.

* * *

Q Do you know how many people there were that had to do with the Oreck Corporation from 1967 to 1970 concerning the matter of sales of Whirlpool vacuum cleaners to Oreck?

A I believe there was one person.

Q Who was that, sir?

A I believe John Payne.

Q Nobody else?

A Not that I know of.

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Q In your discussion of vacuum cleaners did you discuss with people at engineering meetings or floor care product meetings major competition? Did I understand you to say you had?

A Yes.

Q And in respect of vacuum cleaners what was the major competition for Sears Roebuck?

A Well, an upright vacuum cleaner is a Hoover and a Eureka; on cannisters, it was also Eureka and

Electrolux.

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mp 1575

GEORGE EDWARD WARDEBERG,

called as a witness on behalf of the defendant Whirlpool Corporation, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TUROFF:

Q Where do you reside?

A St. Paul, Minnesota.

Q By whom are you employed?

A Whirlpool Corporation.

Q How long have you been so employed?

A Since 1957.

Q Would you give us a very brief rundown of your work experience at Whirlpool?

A I started in the St. Joseph, Michigan, plant as management trainee in 1957; from there to the Clyde, Ohio, plant in 1960, as manager of quality control; from there to the Evansville, Indiana, plant as director of personnel; from there to the director of sales to Sears at Evansville, and then to St. Paul as general manager of sales to Sears, floor care products, and then director of manufacture.

Q Now, when you were in the function of sales to Sears at Evansville, when was that?

A From 1968 to 1970.

Q Did that have anything to do with vacuum cleaners?

A No, it did not.

Q Then was it in 1970 that you took over the function of sales to Sears at St. Paul?

A Yes.

Q Did that have anything to do with vacuum cleaners?

A Yes, that was my prime responsibility, vacuum cleaners.

Q You held the position with regard to sales to Sears for vacuum cleaners from 1970 until what time?

A Approximately 19773.

Q Would it be fair to say that in the period 1970 to 1973 when you were in charge of the sales to Sears of vacuum cleaners that you would be the person at Whirlpool Corporation who would have the most direct contact with the Sears vacuum cleaner buying department?

A Yes.

Q Was it your job to be the contact man?

A Yes.

Q Now, Mr. Wardeberg, did you at any time have any conversations or correspondence with anybody at Sears concerning the use of Sears own tools to make aprivate label vacuum cleaner for the Oreck Corporation?

A No, I did not.

Q Did you ever have any correspondence or correspondence with anybody at Sears Roebuck & Company concerning Oreck Corporation being in the direct mail business?

A No, I did not.

Q Did you ever have any correspondence or conversations with anybody at Sears Roebuck concerning the prices at which the Whirlpool Corporation sold vacuum cleaners to the Oreck Corporation?

A No.

Q Did you ever have any correspondence or conversations with anybody at Sears Roebuck & Company concerning Oreck Corporation's desire to market in Canada?

A No.

Q Did you ever have any correspondence or conversations with anybody at Sears Roebuck & Company concerning a Parcel Post package for the Oreck Corporation?

A No.

Q Did you ever receive any complaints from Sears Roebuck & Company, written or oral, concerning Oreck's being in the vacuum cleaner business?

A No, I did not.

Q Did you ever have any correspondence or conversations with anybody at Sears concerning whether or not

Whirlpool should enter into a distribution contract with the Oreck Corporation?

A No, I did not.

Q Did you ever have any correspondence or conversations with Sears whether or not Whirlpool should terminate the distribution contract with Oreck?

A No, I did not.

Q Did you ever have any conversations or correspondence with anyone at Sears Roebuck & Company concerning whether or not the distribution contract between Whirlpool and Oreck should be allowed to expire by its terms on December 31, 1971?

A No, I did not.

Q To whom did you report in your function of sales to Sears on vacuum cleaners?

A To Robert Upton.

Q Did Mr. Upton at any time indicate any dissatisfaction on the part of Sears Roebuck Company with Oreck being in the vacuum cleaner business?

A No.

* * *

Q You say you reported to Robert Upton. What was

his function in the Whirlpool organization?

A He is a group vice-president.

Q Is there any description of what his function is as group vice-president?

A Well, under his responsibility is the responsibility for the complete St. Paul Division, along with the relationship with Sears.

Q When you say along with the relationship with Sears, is he the person at Whirlpool who is responsible for the relationship with Sears Roebuck?

A Yes, he is the overall responsibility.

Q Does he sit on the Whirlpool board of directors?

A Yes.

* * *

Q Mr. Oreck, since you have been on the witness stand yesterday have you had an opportunity to determine the number of vacuum cleaners sold from the year 1972 to present?

A Yes, I have.

Q Can you tell us now the number of vaccum cleaners sold by the Oreck Corporation in the year 1972, excluding, as we talked about. the hand vacuum cleaners?

A Yes.

May I, by way of explanation, just say what I have done here?

Q Why don't you tell us what you have done.

A All right.

I called my people in New Orleans and they pulled together the figures, as you requested, by unit sales, and I have them here and I would like to refer to my notes, if I may, because they are broken down.

Q Yes, I think as to numbers because I have no figures.

A If that's agreeable. And at the same time I asked the accountants here, who have been really burning the midnight oil, to pull together all of the financial figures for the same period of time following along your recommendations yesterday, your Honor, which Mr. Sommer has, and I have also asked them to include in there such other things which might be germane like my salary, and so on, to those figures and they have all of those things. And if he may, Mr. Sommer can testify to that and I can give you this.

Q Let me ask the questions one at a time and then we will get to that?

A Okay, yes.

Q Do you have the figure for the total number of vacuum cleaners, that is upright, upright canister, but excluding hand vacuum cleaners which Oreck Corporation sold

in the year 1972?

A Yes, sir.

Q What is that figure?

A This is for the full year of 1972.

Q Calendar.

A Calendar year. And while we normally keep our fiscal year through -- mid-year through June so we have to interpolate, so everything we talk about will come out right, in answer to your question, sir, in 1972 we sold 27,602 units. And I think, if I may mention relative to this, this does include -- there were 91,800 units purchased in 1971 from Whirlpool. And, as has been previously mentioned, of the 91,800-odd units that were purchased from Whirlpool in 1971, 78,000 some-odd were sold during the period.

The remainder remained in inventory and were sold principally in 1972. So the figure of 27,602 does consist of a good --

Q Some Whirlpool machines?

A Well, the substantial portion of them would be Whirlpool because we had really nothing else in that category during '72.

Q Toward the end of 1972 you got a different

machine, did you not, to sell? A different manufacture is what I mean.

A In 1973 -- there may have been a few at the end of '72. I would say less than a hundred, a very inconsequential numbe. But beginning in 1973 we did start to receive our other upright cleaner and our total sales --

Q Let me just ask you one question.

A Yes, sir.

Q When you talk about selling 27,602 units, just so that we will be absolutely clear what we are talking about, I assume we are treating the motorized head and tank as one unit?

A Yes, which is what we have done in all the previous --

Q So we understand what we are talking about.

A That is correct, which is the way we treated the previous ones, as well, as a unit.

Q Do you have the figure for the total number of vacuum cleaners of these types you talked about, excluding the hand vacuum cleaners, for the calendar year 1973?

A Yes, sir, the calendar year of 1973 we sold 44,816.

Q Do you have the figures for the calendar year

1974?

A Yes, sir. In 1974, the celandar year of '74, we sold 57,871.

Q Do you have the figures for the calendar year of '75?

A In 1975 -- and I may add these are Oreck machines now, we now call them Oreck machines -- it was 59,487 units.

Q Do you have the figures for the year 19&6 roughly to date?

A Yes, sir, I do. And I think this will be quite accurate. 31,087.

Q And that runs from the beginning of '76 to what date?

A To approximately June 14th, as best as we could determine the starting time. There may be a week there one way or the other. I may be off a little, but not very much.

Q All right. I believe you said you had Mr. Sommer calculate the profit figures, is that correct?

A Yes, I did.

Q You didn't do that, did you?

A No, I did not. I had Mr. Sommer take all of our reports, our tax returns and everything that would be

germane and Mr. Sommer has computed all of that and he could better answer it than I.

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Q But my question to you --perhaps you didn't understand me -- did you have occasion to calculate the actual net profit figures, that is, what Oreck Corporation's actually was in the year '72 to present?

A We -- there was made available to use the tax returns that Oreck Corporation filed so that these are a matter of record and we took our information from that. These were prepared by their regular public accountants and we used that information. There was no need to recalculate what they had done.

Q So, if I understand, you made no independent calculation of the net profit, but you took the Federal returns which had been filed and you simply took the figures off of that?

A Correct.

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Q Can you give us the net profit or loss of Oreck Corporation on the fiscal year basis as you did it from

whatever date you started until the present?

A Certainly.

For the year ended June 30th, 1968, the net profit was $39,598.

For the fiscal year ended June 30th, 1969, the taxable income was $81,611.

For the year ended June 30th, 1970, Oreck reported a net income of $46,460.

For the fiscal year ended June 30th, 1971, Oreck reported a net income of $23,186.

For the six months ended December 31, 1971 Oreck had a taxable income of $173,687.

Q Pardon me?

A $173,687.

Q It made $173,687?

A During the six months ended December 31st, 1971.

For the six months ended June 30th, 1972 Oreck had a taxable loss of $164,035.

I call to your attention that included -- this loss was reduced by a new item of income hich never appeared before, and that is list rentals, which if it had not occurred their loss would have been $178,606.

For the year ended June 30th, 1973 Oreck

reported a taxable loss of $152,091, which included list rentals of $18,946, which if it had not occurred, this extraneous item of income, the loss would have been $171,037.

For the fiscal year ended June 30th, 1974 Oreck had a taxable loss of $87,901, which was after a list rental income of $13,162, which meant from the normal operation there was a loss of $119,063.

For the fiscal year ended June 30th, 1975 Oreck had a profit of $108,952, which included list rentals of $61,731, or a net profit before list rentals of $47,221.

For the eleven months ended -- which tax return, of course, has not been filed -- their internal report shows taxable income of $48,430, list rental of $48,459, or, in effect, a $29 loss during this eleventh month period.

(Continued on next page.)

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MR. TUROFF: I have just one further matter and I am finished. We would like to read from one answer of the Oreck Corporation to interrogatories in this case.

The answer is sworn to by Marshall Oreck on January 10, 1973, Interrogatory No. 2 -- does the Court have a copy?

THE COURT: You go ahead.

MR. TUROFF: Interrogatory 2 reads:

"Identify each and every person, firm, corporation or other entity who, during any year, purchased one or more Whirlpool products from you, and with respect to each state:

"(a) your gross annual sales;

"(b) your gross annual profit;

"(c) your net annual profit.

"(In answering this interrogatory and other interrogatories calling for annual information, you may give the information requested either for the calendar or fiscal year, provided you specify which.)"

And in the answer to Interrogatory 2, which I think we can skip down to page 4, states:

"Further answering Interrogatory No.2, Oreck's gross annual sales, gross annual profit, and net annual profit (loss) are as follows:" --

And there is a column "Year, Sales, Gross Profit (Percentage of Sales), Net Profit or Loss."

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There is a little asterisk next to the Year indicating the Oreck fiscal year ending on June 30 of such year, except that (a) 1963 is a calendar year to November 30, 1963, (b) the 1964 figures include only December, 1963, and the first six months of calendar 1964, and (c) the "1971 end" figures are for the last six months of calendar 1971.

The figures are as follows, and I will read the year and the net profit or loss:

1963, loss, $10,705.

1964, profit, $658.

1965, loss, $75,706.

1966, loss, $29,303.

1967, loss, $29,860.

1968, profit, $26,248.

1969, profit, $84,247.

1970, profit, $79,682.

1971, profit, @4,710.

1971 (end) loss, $128,416.

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Q Mr. Sommer, 193-G for identification is designated Oreck Corporation Summary of Operations July 1, 1967, to December 31, 1971. Is this a chart from which you testified tothe questions put to you by Mr. Turoff?

A Yes.

Q How was this chart prepared, sir?

A This chart was prepared from Oreck's Federal income tax returns, with the exception of the last column, which was based on internal numbers.

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Q Now, Mr. Sommer, there was read into evidence at the close of the defendant's case some data in answer to Interrogatory No. 2, the answer being supplied by the Oreck

mp5 Sommer-direct

Corporation as to gross annual sales and profit and net annual profit or loss. I show you these materials and ask whether to the extent that any differences appear you can state what the differences are, and if you know what the reasons for the differences are --

MR. TUROFF: I am going to object, because whatever the figures show they speak for themselves. They have been read into the evidence and there is no testimony that this witness prepared the answers to the interrogatories, and I would think his testimony would simply speculative.

THE COURT: There is no foundation as to awareness of the source of the figures in the interrogatories.

MR. HOFFMANN: He has indicated his awareness of the sources of the chart which he prepared.

THE COURT: That has only half to do with it.

MR. HOFFMANN: I am asking him to explain the differences.

THE COURT: He has to show some familiarity with the other figure before he can do that.

MR. HOFFMANN: Could we get just a comparison of the exhibits and the answers to interrogatories, the points where any differences exist?

THE COURT: There are two figures to compare.

mp6 Sommer-direct

Q What differences are there that you are examining, sir?

A I am trying to digest it and comparing them to the documents we had available last night. We started with the year ending June 30, 1968 --

THE COURT: No, Mr. Sommer, you are being asked a very, very simple question. There are two figures and you are being asked to state what those two figures are. You are not being asked to state what you thought about it, what you did or what you didn't do. One figure is 173,687, which is the figure you gave us as Oreck's profit for the last half of the year 1971; there is another figure from the interrogatories for that same period as I understand from counsel, and that figure is what?

THE WITNESS: 128,416.

THE COURT: As a loss.

THE WITNESS: Is the question addressed only to that line?

THE COURT: That is the only line that it is being addressed to.

Q Can you tell us from your study of the Oreck records what the reason or explanation for the difference is?

MR. TUROFF: I object to that. He is inter-

preting the answers to interrogatories that he didn't sign.

THE COURT: Yes. Until you lay such a foundation, it seems to me there is no basis for it, what his familiarity with the loss of 128,000 is.

Q Does the explanation appear from the face of the documents before you?

MR. TUROFF: I didn't hear.

THE COURT: If it does, then we don't need this gentleman to tell us.

MR. TUROFF: That is correct.

THE COURT: I will sustain that objection. If his answer is yes, that is all we can go.

MR. HOFFMANN: Perhaps the answer isn't yes.

THE WITNESS: May I ask for clarity, that the question be restated or read back?

THE COURT: You are asked whether the explanation for the $128,000 appears from the face of the answers to interrogatories itself.

THE WITNESS: I would have to conjecture where this number came from.

THE COURT: You may not conjecture.

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Q I want to be sure. Look at Exhibit 193-G.

MR. HOFFMANN: That is really 106-E in evidence.

MR. TUROFF: Shall we change 193 to 106?

MR. HOFFMANN: That is the reason when I offered it we didn't go any further because it was already in evidence nad had a number.

MR. TUROFF: Perhaps you can help me, your Honor. I don't know which number.

MR. HOFFMANN: Before I confuse the record any more, your Honor, let me straighten this out at the table.

THE COURT: Yes. This went in about 15 minutes ago under some other number.

MR. TUROFF: 193-G, did it not?

THE CLERK: Yes.

MR. HOFFMANN: I apologize. It is 193-G, you are quite right.

MR. TUROFF: Thank you.

Q And look at the last column entitled "Six Months Ended December 31, 1971."

A Yes.

Q Those figures are not off the tax return, are they?

A No, those are from the internal financial statement.

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(Proceedings continued in the courtroom with the jury in the box.)

THE COURT: Ladies and gentlemen, may I at the outset thank you for the careful attention that I have seen you all giving to the proof that you have listened to and considered over the last three weeks. It appeared from what I observed that you are fully prepared to discharge your final function as jurors here, which is to decide, as I told you at the outset, the fact issues in this case. Now, as I also said at the outset, you are the sole and exclusive judges of those facts. It is you who pass upon the weight of the evidence; it is you who will determine the credibility or the believability of the witnesses that you have listened to; you will resolve such conflicts as you find exist in the testimony, if you so find, and you may draw such reasonable inferences as may be warranted by that evidence.

I caution you that you may not and must not speculate or guess; you may not conjecture. I also wish to recall to your attention my statement that upon becoming jurors in this case, you do not leave your common sense in the hallway; you keep it with you at all times and apply it at all times.

Now, my function at this point in the trial

is to instruct you on the law that you are to apply in this particular case, given the various alternatives that appear to come from the evidence. It is your duty to accept these instructions of mine and to apply them to the facts as you may find them. In your determination of the facts, you will rely upon your recollection of the evidence. What any attorney may have said to you at any time during the trial or during summation, or what I may have said at any time, or what I may say during these instructions with regard to any matter of evidence or any bit of proof, is not to be taken in place of your own recollection of what that testimony actually was. Since it is your recollection that governs, and you should be secure in that recollection, if you have any genuine concern about it, then you may have testimony reread to you. Of course, you may ask for and take into the juryroom any exhibit that has been received in evidence.

I may say that just because I may comment on certain matters of proof or evidence, does not mean that I regard those matters as any more important than any other evidence in the case. I may use certain evidence as illustrative. Youare, of course, to consider all of the evidence in this case in arriving at your conclusions, not just that which the attorneys may have drawn

to your attention or that I may draw to your attention in connection with this charge.

Every party appearing before this Court and before you is entitled to a fair and impartial trial, regardless of the size of the corporate parties. All parties, individuals or corporations, regardless of size, all stand as equals here in this courtroom before you and before the law.

You should not and must not be governed by any sympathy or by any form of prejudice, but you should reach a just verdict on the evidence, and the evidence alone. You are not to assume that I have any opinion as to the truth or falsity of any claim of any party. The fact that I have denied motions or granted motions during the course of the trial, or ruled on objections one way or another, is not to be taken by you as any indication that one party is to be believed by me to be more or any less reliable than any other party. My rulings on motions were matters of law, with which you as jurors have no concern. Your determination has to do with issues of fact here. As to that, I have no concern.

If during the course of the trial a question was asked and there was an objection which I sustained, you are to disregard the question and any alleged facts

contained in it. Similarly, if I ruled that an answer was to be stricken from the record, you are to disregard both the question and the answer in your deliberations.

This is a civil action in which the plaintiff, the Oreck Corporation, seeks to recover a sum or sums of money to compensate it for the injuries and losses which it claims resulted from the alleged wrongful acts of the defendants, Whirlpool Corporation and Sears Roebuck Corporation. In this regard, I wish to point out to you that a corporation is in law a person, but, of course, obviously, it cannot act otherwise, than through its directors, its officers, its employees or other agents. The law, therefore, holds a corporation responsible for all unlawful acts, all the acts of its directors or officers or employees or other agents done within the scope of their authority. I also want to point out to you, as I did at the outset, the mere fact that a plaintiff makes claims against the defendants and has brought a lawsuit does not mean that the plaintiff is entitled to recover. The law requires that before a plaintiff can recover at your hands you, the jury, must be persuaded that the plaintiff has proved its claims, proved its right to be compensated by a fair preponderance of the credible, believable evidence. I, therefore, wish to call to your attention the fact

that in a civil case the plaintiff has what we call the burden of proof. This means that the plaintiff must satisfy you, the jury, that it has proved its contentions by a fair prepondernace of the credible evidence. This means that you should take all of the evidence in your mind, that which supports the plaintiff's contentions against that which supports the defendants' contentions, and you should then determine which is the more convincing, which is probably the correct version of the facts, which seems to you to make more sense, which is more likely so than not so. Here, again, we are talking common sense. This does not mean that you should add up the number of witnesses on each side and actually balance them.

The mere fact that one party may have called fewer witnesses, or that one party's case took longer than another party's case is not important in this regard. You, the jury, are not and should not and must not be interested in the quantity of the evidence or the time consumed by any party, but in the quality of the evidence that you have heard. Which evidence is more likely to represent the true picture of what actually happened here?

Should there be conflicting evidence and should it be evenly balanced in your mind so that you are unable

to say that the evidence on either side of an issue preponderates, then your finding must be against the party which carries the burden, which is here, the plaintiff.

That is, if you imagine in your mind the scales of justice, as we see them backed up there in the frieze on the corner of the wall, the party that has the burden of proof must tip those scales slightly in its favor. If those scales remain evenly balanced, or they go down to the defendants' side, then the party carrying the burden here, the plaintiff, has not sustained that burden, and the necessity to sustain that burden applies to all of the claims in this case, and if the burden is not sustained, then you must find against the plaintiff and for the defendants.

Now, the facts in this case may be proved by either direct or circumstantial evidence. It must be by one or the other. Direct evidence is where a witness testifies to what he saw, heard, or observed, that which he knows of his own knowledge, that which comes to one by one's own senses. Circumstantial evidence is where facts are established from other facts properly proved from which you may logically infer the facts sought to be established. You may infer that on the basis of reason and experience, from establishe

fact to the ultimate fact to be proved. Circumstantial evidence, if you credit it, is of no less value than direct evidence.

Now, to give you a very homely example of the difference between the two, if these curtains were drawn when you had come in this morning and the sun had been shining when you walked into the building, and a half-hour after coming in, a man walked through the back door there brushing drops of water off a raincoat, and another man came in with an umbrella from which he shook drops of water, what you would see, the man with the raincoat and the man with the umbrella, that is direct evidence, because you viewed it yourself, it came to you from your own senses. That fact, however, is circumstantial evidence of the fact that since you came into the building the sun had stopped shining and it had begun to rain, even though you had not seen the rain, knew nothing about the rain, but you would deduce from that fact that it had begun to rain. That is all there is to circumstantial evidence. You go from one fact proven to you to another one which you can reasonably infer from the first one.

Now, even though the testimony of a witness before you may be uncontradicted, you are not compelled to accept that testimony. You may accept it or reject it,

depending upon whether or not it commends itself to you, taking into account, among other things, the demeanor of the witness on the stand, the impression he or she made upon you, as I will instruct you more fully hereafter.

Now, before discussing plaintiff's claim and his legal theories in some detail, it is appropriate to discuss with you one of your major functions in deciding the facts, that is, your function of determining the credibility or believability of witnesses who have testified here before you and determining the weight to be accorded to their testimony.

You have heard considerable testimony in this case. Some of it is in conflict. How do you resolve such conflicts as you may find? How do you determine the weight to be given to the testimony of various witnesses? How do you determine if they are credible? Among other things, again, in your search for the truth you use your everyday common sense. You have seen the witnesses that have taken the stand, you have heard their testimony, you have observed their demeanor. How did each impress you? Did the witness appear to be testifying frankly, candidly, fairly?

In other words, in evaluating the testimony and believability of a witness, you apply your common sense

and experience, precisely as you do in determining an important matter in your own life. You should consider, as I am sure you will, the witness's demeanor, his background, his candor, his lack of candor, his possible bias, his means of information, his accuracy of recollection. You should consider whether a witness's testimony is supported or whether it is contradicted by other credible and believable evidence and circumstances in the case.

David and Marshall Oreck in this case have an obvious financial interest in its outcome. You may consider that fact in determining the weight and credibility to be given their testimony. You have heard witnesses from the defendant corporations who are employed by those corporations. Does that give them an interest in the outcome of the case? You may consider whether that employment is a factor to be considered in evaluating their testimony.

However, I want to say, the fact that a person has an interest in the outcome of the case does not mean that he is not capable of giving a truthful, accurate account of events. It is for you to determine whether a witness's interest has, in fact, affected his testimony or not.

If you find that any witness, fact witness or

expert witness, aswell -- this includes the experts who testified here, Messrs. Ritchin and Sommer -- if you find that any witness has made a material misstatement of fact with the intention of misleading you, you may disregard that portion of the witness's testimony which you do not believe, or you may disregard all of it, or you may accept that part which you find reliable and disregard the rest. These are matters for you to apply to the testimony that you heard and see whether they fit into your deliberations.

Now, in talking about witnesses I want to talk about a special kind of witness, that is, one we/lawyers frequently call an expert witness. We had two such witnesses who testified here in court before you, Messrs. Ritchin and Sommer. Normally, the rules of evidence do not permit a witness to testify as to an opinion. A so-called expert witness,however, is an exception to this general rule. An expert witness is nothing more than a person who has been tendered as one who has become expert in a given profession, and he is, therefore, permitted to state his opinion in technical fields as to matters in which he is presumably learned and which are material to the issues in this case. He may also state his bases or his reasons for his opinions.

While one qualified as an expert may make statements conderning probable profits or losses of a going business, you should in weighing all such evidence take into consideration, among other things, the truth or falsity of the basis of the statements, the knowledge or lack of knowledge that the witness has of all the conditions upon which the statement is based, whether the facts assumed as the basis for a statement rest on actual accounts and records kept in business or on certain recollection and the experience and the knowledge of the witness in a particular line of business concerning which he testified.

All this has to do with a later materr which I shall get to concerning the issue of damages.

However, ladies and gentlemen, just because a man is called as an expert, is called an expert, does not mean that you are obliged to accept his opinion or follow his views. Quite to the contrary, you are entitled to accept or reject the opinion evidence given by any expert witness depending upon how you assess his statement, his opinions and the reasons that he gave for them.

You and you alone are to decide to what extent you wish to believe or accept or reject the opinion of an

expert witness.

Now, there has been an issue raised as to Whirlpool not calling John Payne, one of its employees and under its control, as a witness. Various statements are attributed to Mr. Payne by the Orecks. The Oreck Corporation took his deposition, as you will recall, on the general subject matter of this case, and Oreck read portions of it as part of its case containing his version of certain events.

If you conclude from the entire record that there were additional matters to which Mr. Payne could have testified beyond those covered by the portions of this deposition testimony that was read to you, you may, although you need not, draw the inference that his testimony would have been unfavorable to Whirlpool on these additional matters.

On the other hand, if you conclude that there were no such additional matters as to which he could have testified, then you may not draw such an inference against Whirlpool since there is no requirement that Whirlpool put Mr. Payne on the stand to take the time of the Court and jury merely to repeat matters already covered in his deposition testimony read to you.

Now, this action arises from a clause in our

Constitution which gives to the United States Congress the power to regulate commerce among the states, commonly referred to as interstate commerce. And obviously interstate commerce is that which passes from one state to another.

Congress, acting within that power, in 1890 enacted a statute known as the Sherman Antitrust Act which was supplemented by the Clayton Antitrust Act of 1914.

Section 1 of the Sherman Antitrust Act declares as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal."

Section 4 of the Clayton Act provides that:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor."

The word "person," as used in these statutes, includes not only an individual, but a corporation, a partnership and any other business organization.

Now, there are before you two claims or counts that have been charged by the plaintiff.

In its first and second claims, the first and

second counts, the plaintiff Oreck charges that the defendants Whirlpool and Sears combined, conspired or contracted to restrain trade in violation of Section 1 of the Sherman Act, which is the statute I read to you a minute ago.

First I shall explain to you the necessary elementswhich the plaintiff must establish to prove a violation of that Section 1.

In order to recover under any of the claims made by the plaintiff under Section 1 of the Sherman Act, plaintiff must show by a fair preponderance of the credible evidence that the defendants Whirlpool and Sears formed a conspiracy, combination or contract which unreasonably restrained interstate commerce in violation of the law.

Second, plaintiff must show that it has in fact been injured or damaged by that violation, and that that injury was directly and proximately caused by such a violation.

And, third, that the plaintiff has been damaged in an amount which can be **reasonably determined in dollars and cents.**

Now, keep in mind a corporation does not violate the antitrust laws merely because of its size, that is its capital or power of production, or merely because of

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its potential power to restrain competition if it is not exerted. Size does not in and of itself restrain trade or injure the public.

To phrase these matters a little bit differently for your assisrance, to establish a violation of Section 1 of the Sherman Act, as alleged in Counts 1 and 2, Oreck was required to prove a combination, contract or conspiracy between Whirlpool and Sears resulting in an unreasonable restraint of trade and that Oreck has been damaged as a proximate result of that unreasonable restraint of trade. I was saying the same thing a little earlier but in different words.

A combination, conspiracy or contract, as used in the antitrust laws and in these instructions of mine means an agreement, understanding or concert of action between two or more persons -- and here we are talking about two corporations, which is the claim -- to restrain trade or to monopolize interstate trade and commerce.

I may say that it is stipulated here that interstate commerce is involved and you need not decide that issue; that the parties have agreed that interstate commerce is involved in this case.

It is not necessary to constitute a combination or conspiracy that participants shall have met together

and entered into a formal or even an informal agreement, or that they shall have expressed their understanding in words or in writing. The combination or conspiracy may be in writing or it may be oral, or it may be completely unexpressed. It may be a tacit understanding existing only in the minds of the parties.

A combination or conspiracy in restraint of trade is formed if two or more persons in any manner, through any contrivance, either by acts or words, arrive at a mutual understanding or agreement to restrain or monopolize interstate trade or commerce.

In other words, if restraint or monopoly of interstate trade is sought to be effected and two or more persons motivated by the common purpose of accomplishing that end work together in furtherance thereof, each one of such persons becomes a member of the conspiracy or combination.

However, only acts which are the result of a combination, conspiracy or contract are prohibited under Section 1 of the Sherman Act. A corporation cannot conspire with itself. There can be no conspiracy, contract or combination unless at least one person in each corporation -- here Whirlpool and Sears -- is involved.

The word "conspiracy" means together with.

Thus, in order to find Whirlpool and Sears guilty of a violation of Section 1, you must find that at some point they acted together to bring about the result charged by the plaintiff.

Once agreement has been reached, however, each conspirator is fully liable for the consequences of any act done by the other co-conspirator in furtherance of the conspiracy.

This is true even though the conspirator being charged with liability has done nothing to effectuate the objects of the conspiracy other than the act of reaching agreement with his co-conspirator to carry out the unlawful act.

Thus, if you find that Sears suggested or advised Whirlpool to terminate Oreck's franchise, or to prevent Oreck from selling vacuum cleaners in any market, then you may also find that Sears is liable for any consequences of Whirlpool's having taken such action.

As to the meaning of the term "restraint of trade," you are instructed that this general term applies only to unreasonable restraints and not to all possible restraints of trade. Not all restraints of trade are reasonable. All business affects trade in some way.

The violations alleged by the plaintiff are, if

you credit them, unreasonable restraints of trade. If you do not credit them, Whirlpool's conduct was not an unreasonable restraint of trade.

I charge you that a manufacturer has the right to deal with whom he pleases and to select his customers at will as long as there is no resultant effect which is violative of the antitrust laws. The manufacturer may discontinue an exclusive distributorship or may refuse to renew an exclusive distributorship for business reasons which are sufficient to the manufacturer alone and any adverse effect such a decision may have upon the business of the distributor is immaterial in the absence of any arrangement or conspiracy restraining trade or competition.

Whether an unlawful combination or conspiracy is proved may be judged by what the parties actually did rather than the words they used -- in other words, their course of dealing.

Keep in mind that if a conspiracy exists it may not have been in a formal agreement that by words spoken or written stated what the object was or the conspiracy was to be or the details of it or the means by which the objects or the purpose were to be accomplished.

Thus, it may well be that the only method whereby one can show an unlawful conspiracy existing is through

circumstantial evidence which, if you credit it, as I have said, is of no less weight than the rest of it.

Should you find that from a preponderance of the evidence in this case that a conspiracy existed and that the defendants were members, then the statements made and the acts performed by any person in furtherance of that conspiracy may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the other defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and the furtherance of some object or purpose of it.

You are instructed, therefore, that in order to recover under Count 1 Oreck has the burden of proving each of the following propositions:

That Whirlpool and Sears combined or conspired to exclude Oreck from the market for Whirlpool vacuum cleaners, or from the vacuum cleaner market generally in the United States and its possessions and to lessen the competition in either of these markets.

Two. That as a result of said combination or conspiracy Oreck was partially or wholly excluded from

the vacuum cleaner market as I have described above.

Three. That as a proximate result of said exclusion Oreck has in fact suffered damage.

Unless you find that each of these propositions has been proved by a fair preponderance of the credible evidence, your verdict must be for the defendants with regard to Count 1.

It is your duty to give separate personal considerations to the case of each individual defendant here. When you do so you should analyze what the evidence shows with respect to each such defendant.

To find by a preponderance of the evidence that a combination or conspiracy existed, you must determine as to each defendant separately and individually whether or not it participated in forming the conspiracy.

The membership of a particular defendant in the conspiracy must be determined from the evidence concerning its own actions.

Each defendant has the right to that kind of consideration on your part as if it were being sued separately.

In light of this, one question I suggest you consider, although I want to firmly state that all questions for you to consider and how you decide them are for you

and you alone to decide in accordance with the evidence, but one question I suggest is whether or not you conclude that some person or persons at Whirlpool had anagreement or understanding with some person or persons at Sears to exclude Oreck from a market in vacuum cleaners or Whirlpool vacuum cleaners anywhere.

If you find there was such an agreement then you shall go on to consider damages, if any, flowing from it. If you do not find such an agreement between Whirlpool and Sears people, then your verdict must be for defendants, for it is not unlawful for a manufacturer merely to try to keep all of its customers happy, large or small.

Plaintiff contents that in determining whether or not a conspiracy existed, you may consider, among other evidence that was urged upon you yesterday, what it contends and has called Whirlpool's "economically irrational behavior" in refusing to sell some approximately $1 million worth of vacuum cleaners to Oreck on or after the termination of the contract in the end of 1971.

Although David Oreck personally claimed to have such a line of credit, as the plaintiffs urge, the plaintiffs point out that thereafter these machines were sold at a loss to others in the market.

Plaintiff urges that you draw from this the inference that Whirlpool deliberately did not want Oreck to have these machines as part of its conspiracy with Sears.

Whirlpool, on the other hand, urges upon you that at that time Oreck did not have the money or any credit to purchase these, or else it would have done so.

Whirlpool argues and calls to your attention the fact that Oreck already owed it some $220,000 for vacuum cleaners already delivered, to collect which sum it was required to go to the State Court and bring a lawsuit.

Whirlpool urges that under these circumstances Oreck, not having the money to buy, it was not to be trusted with further credit where it had already then been extended substantial credit without making payment.

It is for you to decide whether this was economically irrational behavior by Whirlpool, as the plaintiff contends, or whether this was sound business judgment justifying refusal to make further sales on credit, as Whirlpool contends.

If it were the former, it would be some evidence of conspiracy. If it were the latter, it is no evidence of conspiracy at all.

You may recall a document, Plaintiff's Exhibit 160, called the Stroop report. This was admitted in evidence only for you to consider, if you credit it, as background material to the Oreck agreement. Even according to plaintiff it was prepared some years before Oreck started doing business with Whirlpool.

It is therefore obviously not evidence of a combination or conspiracy between Whirlpool and Sears as to Oreck and you are not to consider it as such.

Under Count 2 of the complaint, Oreck alleges that Whirlpool, either alone or in concert with Sears, expressly forbade Oreck to distribute and otherwise prevented it from distributing Whirlpool vaccum cleaners and other products in Canada, the effect of which was to limit the territory in which Oreck might sell vacuum cleaners, attachments and parts all to its damage, plaintiff claims.

Whirlpool and Sears deny these allegations.

You are instructed that in order to recover under Count 2 Oreck has the burden of proving one or both of the following:

1. That Whirlpool and Sears combined or conspired to prevent Oreck from selling vacuum cleaners and other Whirlpool products in Canada; that as the

result of this combination or conspiracy, Oreck was prevented from selling vacuum cleaners and other products in Canada, and that as a proximate result of the aforesaid Oreck suffered damage.

Or, alternatively -- two -- that Whirlpool alone wrongfully prohibited Oreck from selling in Canada and that as a proximate result of this Oreck suffered damage.

If you find that there was a conspiracy, you shall go forward and determine what if any damage Sears and Whirlpool caused.

If you find that Whirlpool alone prevented Oreck from selling in Canada, you shall find in favor of defendant Sears on this count and consider damages, if any, against Whirlpool alone.

4 I charge you that a manufacturer may not seek to restrict and confine areas in which an article may be resold after the manufacturer has parted with title and dominion over it. Arrangements to territorial limitations restricting the territory in which a product may be resold are unreasonable restraints of trade in and of themselves and are unlawful under the Sherman Act where such an arrangement is made between a buyer and seller of the product.

You need not determine whether such territorial arrangements are reasonable, or whether they have an impact upon the marketplace, nor need you be concerned with the business or supposed economic justification for such arrangements, or supposed jusitficiation for the territorial restraint.

If you find that Whirlpool alone or in concert with Sears prevented or substantially prevented Oreck from selling the vacuum cleaners in Canada, then you must find that defendant Whirlpool violated Section 1 of the Sherman Act.

Moreover, if you find that Sears conspired or acted in concert with Whirlpool to prevent Oreck from selling its vacuum cleaners in Canada, then you must also find that Sears unreasonably restrained trade in violation of Section 1 of the Sherman Act.

Even if you find, as plaintiff contends, that there was an understanding between Whirlpool and Sears unlawfully restricting the territory in which Oreck might sell to the United States and its possessions, still you may not find a violation of the antitrust laws under Count 2 unless you also find that Whirlpool was firm and resolute in insisting upon compliance with that provision and took steps to enforce it.

Plaintiff points to a telegram from Mr. Payne declining to "waive" the restriction and in Whirlpool's not applying for CSA approval, among other pieces of evidence.

Defendants, on the other hand, contend that the contract had with Oreck did not contain a restriction in which Oreck could sell and that Payne's telegram was a mistake.

It further contends that Oreck in fact sold in Canada in the years 1966 and 1968 without criticism.

I instruct you that the term "exclusive distributor," which is in the contract between the parties, is no more than a description of a primary merchandising area which Whirlpool had agreed it would put no other distributor and you may not infer from the use of that term alone any restriction on the geographical location in which Oreck was permitted to sell goods purchased from Whirlpool.

Absent any showing of conspiracy, you are instructed that the antitrust laws themselves place no obligation on Whirlpool to alter its vacuum cleaners to comply with CSA, which are the Canadian requirements, or to submit the vacuum cleaners to CSA for approval so that Oreck Corporation might more readily market them in Canada.

Now, I am not going to marshal, ladies and gentlemen, the evidence on each side. That was done by counsel at great length yesterday, but I want to say that you are to consider all of the evidence in the case, all of the arguments of the lawyers in the case, whether from all of the evidence, whether referred to by counsel or by me, for all of it is important in your deliberations.

If upon all the evidence you find that the plaintiff has sustained its burden of proof on the claim of antitrust violations as to both defendants on Count 1, or as to both or only Whirlpool on Count 2, then, ladies and gentlemen, and only then do you reach the question of damages.

If Oreck has failed to sustain its burden of proof on the claim of antitrust violations, then you are to report a verdict in favor of defendants Whirlpool and Sears and proceed no further.

I want to clearly state to you that the fact that I am instructing you on the law of damages is not to be regarded by you as any view on my part as to who is entitled to prevail, or as to whether damages are to be awarded or not, or, indeed, in any way as to how you are to decide this case. That, as I have told you before, is exclusively your function.

I give instructions on the law of damages solely for your guidance in the event, if upon all the evidence, you find that the plaintiff is entitled to a recovery in some amount.

If you find for Oreck, for Oreck the plaintiff, on the issue of liability, then I instruct you that Oreck is entitled to recover only such damages, if any, as you find have been established by a fair preponderance of the credible evidence to have been suffered as a direct and proximate result of the alleged conspiracy charged in the two counts.

Oreck Corporation here, as on the issue of liability, has the burden of proof. In sum, the plaintiff must establish the causal relationship between the anti-trust violations it claims occurred and the claimed damage or injury to itself that is said to flow from it.

The concept of proximate cause, which you have heard me use, is one which causes in a natural, continuous sequence injury unbroken by any new cause and without which the injury would not have occurred.

If you should determine that the evidence that Oreck did sustain losses and injuries to its business or property, but such losses and injury were occasioned and caused by conditions and matters separate and distinct

and apart from any alleged wrongful or unlawful conduct by Whirlpool or Sears, then your verdict must be in favor of Whirlpool and Sears no matter how serious the loss sustained by Oreck might have been.

Thus, Oreck is not entitled to recover any loss which may have been suffered from other causes such as general economic conditions, bad business judgment, recession, inflation or other factors for which Whirlpool and Sears are not responsible.

The purpose of the law is to award as far as possible just and fair compensation for the loss which directly results from the wrong in question. Damages must be purely compensatory and reasonable, neither inadequate nor excessive. The matter rests in your sound discretion and you will be guided by your common sense and experience.

If you find for Oreck on the issue of liability there are two cautions. You are not to assess any damages based upon Whirlpool's alleged refusal to furnish private label vacuum cleaners to Oreck, although you may consider that evidence, if you credit it, on the question of the existence or non-existence of the conspiracy.

Also there is no longer before you any question of similarity or identity of the Sears and the Oreck

vacuum cleaners.

You may remember the afternoon in ...ch there was a disection before you of the two machines. That question and those issues are no longer before you to decide and you are not to give any thought to it or speculate about it in any way. Those matters are not before you by reason of matters of law with which you have no concern, and you are only to decide the facts on the case as submitted to you and not give consideration to anything else.

Oreck claims as damages in this case the loss of profits which it reasonably could have anticipated and which would have been realized by it had it not been for the alleged wrongdoing of the defendants, and it has offered evidence of the anticipated profits it would have made on its operations had the agreement not terminated.

If you reach the question of damages, it is for you to determine whether such evidence supplies a reasonable proximation of injury done to Oreck.

Loss of profits may be an item of damage in a case of this kind to the extent they are shown with reasonable certainty and to the extent they result as a direct and proximate effect of the alleged wrongdoing of the defendants.

In arriving at the amount of lost profits sustained by Oreck, you are entitled to consider the past earnings of Oreck in the business in question. You are to consider as well all other evidence concerning the general economic and competitive conditions as you may find them that bear upon that issue.

If you find that Oreck had in fact suffered damage, then you must determine the amount of actual damage which it has suffered.

Oreck is not required to prove the precise amount of loss which it has suffered. For if you find that a defendant is liable to the plaintiff for damages, the defendant being the wrongdoer, cannot insist that damages be proved with exactness. However, you may not render a verdict which awards an amount of money based upon mere speculation or guesswork.

Oreck must satisfy you by a preponderance of the evidence that it would in fact have made net profits in addition to those which it actually made if not for the alleged antitrust violations. And Oreck must furnish you with a fair and reasonably accurate standard to measure just what that additional net profit would have been.

Thus, if the amount of Oreck's damage is left

uncertain and you cannot ascertain the amount of such damage with a reasonable degree of certainty, apart from conjecture or mere speculation, then you may not return an award of damages for Oreck.

In considering the issue of damages, you must consider, among other things, whether Oreck was making a profit on the Whirlpool machines or not, and whether or not in your judgment, based upon the record, that profit would have continued into the future.

Plaintiff contends it was making a profit and that you may so conclude. Whirlpool urges that certain sworn figures by Marshall Oreck to the effect that in the last six months of the contract in 1971 it had a $120,000 approximate loss demonstrated that it was not making a profit, but had a serious loss.

Mr. Sommer, the accountant put on as an expert witness by plaintiff Oreck, testified to the contrary; that there were in fact profits for that period in the area of $170,000.

This figure, if you credit it, would be some evidence of a profitable expectancy for Oreck.

You, however, must make an initial determination of whether you credit the $120,000 loss sworn to by Marshall Oreck two years ago, or the $170,000 profit sworn

to by Mr. Sommer, Oreck's witness on the witness stand on the trial.

Plaintiff made no effort to reconcile these two figures for you, both of which it presents. One of them is obviously not so and you must resolve the question of which, if either, is correct, keeping in mind the instructions I gave you earlier on the credibility of witnesses.

Once you have determined this question, you must decide how your determination affects the question of lost profits, if any, that you are considering.

You are instructed that all claims for damages from alleged violations of the antitrust laws are barred if brought more than four years before they accrue.

Generally, the cause of action accrues and the statute begins to run, which is the statute of limitations, when a defendant commits an act that injures a plaintiff's business. And thus you may not award damages to Oreck which result from acts of either Whirlpool and/or Sears, which damages were incurred more than four years prior to the complaint being filed on July 28, 1972.

Thus, the statute of limitations would bar any claim for you to consider that occurred prior to July 28, 1968.

Now, I am getting close to the end. I have

determined that as a matter of law it is appropriate for the plaintiff to endeavor to prove damages to you on the sale of vacuum cleaners for the five-year period succeeding the date of the termination of its contract, which is the end of 1971, assuming that you find that the termination was unlawful as earlier charged.

You are to determine whether or not in that five-year period there would have been further sales by Oreck of Whirlpool vacuum cleaners and what those further sales would have been.

You are to make this determination upon the entire record and upon the evidence you heard from the witnesses themselves.

Also, if you determine that Oreck would have made sales in some amount of Whirlpool vacuum cleaners in the five years following the contract termination, you may also consider whether over the ten-year period following the sale of any such vacuum cleaners, any such individual vacuum cleaner, Oreck would have sold and made a profit upon the dust bags and accessories which are needed in the use of such a machine.

There is evidence in this case that the life expectancy of a Whirlpool vacuum cleaner is 15 years.

Plaintiff urges upon you in your consideration

of the dust bags and accessories aspect a possible ten-year life following the sale and the first use of the machine for the purpose of gauging how long a housewife or other user might be ordering dust bags and accessories for the purchased machine.

If you find the first cause of action that Whirlpool and Sears conspired to exclude Oreck from the American market, you shall determine what sales would have been made in the five years following the termination, keeping in mind all of the factors, including Oreck's prior sales history, the economic condition of the country, competition that might be expected and various other factors earlier mentioned to you in reaching this determination.

If you find that Oreck would have made sales of any vacuum cleaners in that period, you may then go on to determine to what extent such purchasers would have purchased dust bags and accessories from Oreck in connection with those machines.

And, similarly, you shall keep in mind all of the factors affecting commerce, including competition, the state of the economy and consumer habits as I suggested, as revealed by the record.

You may not consider sales of dust bags and

accessories more than ten years beyond the sale of any given machine in determining potential damage.

If you conclude that Sears and Whirlpool conspired to keep Oreck from the Canadian market, you shall determine what damages, if any, were suffered by Oreck by reason of that exclusion. In doing so, you shall apply the tests to the basic machines and the dust bags and accessories as you applied in determining the damages, if any, in the American market, keeping in mind there is testimony that the population of Canada, while roughly similar to that of the United States in terms of economic make up, is only one-tenth its size.

If you do not find that Sears and Whirlpool conspired to exclude Oreck from the Can ian market, but find that Whirlpool alone deliberately limited Oreck to the United States and its possessions and prevented it from selling in Canada, then you may determine damages against Whirlpool alone and not against Sears based upon what you conclude was the loss of vacuum cleaner sales and dust bags and accessories in Canada in accordance with the instructions I have given you.

The plaintiff through its accountant Mr. Sommer has put into evidence certain exhibits in what I will call the Plaintiff's Exhibit 193 series which are all accountant'

charts. These charts are offered merely as an aid to you representing the plaintiff's view of what the evidence was supporting its claim for damages put in a tabulated form.

If the figures are not borne out by the evidence and do not represent the facts as you find them, or if they do not accord with your view of the reasonable picture for the future, you shall reject them.

However, if they do reasonably represent in whole or in part the future and are supported by the evidence then you may use them accordingly. In other words, the plaintiff is saying to you by these charts that from the testimony it feels it has demonstrated to you that it would have earned a net profit on the sales of Whirlpool vacuum cleaners in the United States from January 1, 1972 through June 14, 1976 the sum of $324,034; that it would have earned as a net profit on the sale of its dust bags and accessories flowing from the said vacuum cleaner sales up to the year 1986 a net profit in the sum of $4,230,016, and that it would it have earned from the sale of vacuum cleaners in Canada from January 1, 1972 through June 14, 1976 the sum of $32,403, and that it would have earned as a net profit on the sale of dust bags and accessories flowing from the said vacuum cleaner sales in

Canada up to the year 1985 the sum of $423,016.

This is what the plaintiff calculates. Unless you are satisfied by the evidence and by the rules of law, as I have given them to you, that plaintiff is entitled to any of these figures, you will, of course, disregard these charts.

If you feel the plaintiff is entitled to less, or it is entitled to anything you shall award what you think in your judgment plaintiff is entitled to based upon the entire record after consideration of all of the evidence and all of the exhibits regardless of the charts.

(Continued on next page.)

T4 Now, ladies and gentlemen, my instructions to you are to be taken as a whole, as an entirety. Do not read into them anything that I have not expressly told you. Consider all the evidence. The fact that I may have referred to some and not other places does not mean that it is not all important. You should consider it all.

A word about deliberating: each juror is entitled to his or her own opinion. Each jury should, however, exchange views with fellow jurors. That is what jury deliberation is all about. Discuss and consider the evidence. Listen to the arguments of fellow jurors, present your individual views, and discuss the case with one another. Consult fairly and openly with one another in the juryroom to reach a verdict based solely and wholly on the evidence, if you can do so without doing violence to your individual judgment.

Each one of you must decide the case for himself or herself after consideration with fellow jurors, but you should not hestitate to change an opinion you may hold which after discussion with your fellow jurors appears erroneous in the light of the discussion viewed against the evidence and the law.

However, if after carefully weighing and listening to all the arguments of your fellow jurors and weighing

the evidence, you entertain a conscientious view that differs from others, you are not to yield up your judgment simply because you are outnumbered or outweighed. Your final vote must reflect your individual conscientious judgment as to how this controversy should be decided as to each claim by the plaintiff against each of the defendants. Your verdict must be unanimous in order to reach a verdict on any claim by the plaintiff against any defendant.

In the course of your deliberations you may, perhaps, desire to have some part of the testimony read, or you may wish to examine exhibits if you find that you are uncertain as to some aspects of the case. You may wish to have some portion of these instructions read back to you if you are uncertain as to anything. In such a case, kindly notify the marshal who will be in charge of you, giving him the note and asking him whatever it is that you wish. Please, in sending a note to the Court, do not state your position on any issue, because that is your business and not mine and not these gentlemen here.

Now, let me say finally: I remind you of your oath as jurors, and that is that you would without fear or favor to anyone, well and truly try these issues joined between the plaintiff and these defendants and a true verdict

give based solely on the evidence and the Court's instructions as to the law. It is important to the plaintiff; it is important to the defendants; it is important to you as citizens, and it is important for justice in this country.

I thank you very much,

Now, gentlemen, are there any requests or exceptions?

MR. TUROFF: Yes.

MR. HOFFMANN: Yes.

THE COURT: Ladies and gentlemen, you stay in place, and we are going to retire to the robing room for a few minutes. You sit right where you are.

(In the robing room.)

THE COURT: Mr. Hoffmann?

MR. HOFFMANN: In respect of the Court's charge on the matter of damages, I suggest to the Court that the exhibits to which the Court referred were all based on the static consideration of the 78,206 units purchased in 1971, which was simply projecting into the future. There was also offered in the 106 series another basis of consideration for consideration of damages as to which the expert witnesses testified, and that was the possibility of taking from the experience factor the increase of 42.6 per cent, which took place, I believe, in the year

1970, over the previous year.

THE COURT: Mr. Hoffmann, let me stop you a minute. I did not purport to review of your damage testimony. All I did was instruct the jury how I believed they should use the charts, the 193 series. I did not purport to argue to them what the various positions were. I was just instructing them on the weight and the consideration that they should give to those particular charts.

MR. HOFFMANN: I understood that. But my exception is based on omission, rather than commission.

THE COURT: I instructed them that they are to consider all the evidence in the case.

MR. HOFFMANN: I don't think they were made aware of the existence of the 106 series of exhibits which you received in evidence, and as to that, two of those were used in connection with the 193 series.

THE COURT: Would it solve your problem if I were to charge them that there is a series of exhibits No. 106 which they are to similarly consider on the same instructions as 193?

MR. HOFFMANN: Yes.

MR. TUROFF: The problem I would have with that, as I understood the evidence, your Honor's rulings as to the 193 series, they replaced the 106 series after the

modifications were made that was suggested by your Honor. Now, if Mr. Hoffmann wants the first Exhibit 106 without a letter, which is, I believe, a listing of the number of vacuum cleaners that were sold in 1968, 1969, et cetera, I would not have objection to that, but I would have objection as to the balance of the 106 series, because my understanding was that that was replaced by the 193 series, and the figures are much different on the balance of the 106.

MR. HOFFMANN: There is a loss of communication. As to the 193 series, I did infer in talking to the jury, and it was integral to the demonstration that we went to two 106 exhibits, Exhibits 106-H and 106-E. Those demonstrated, for example, how the residual profit figure was arrived at. I went through that with the jury, gave them the $2.084 figure.

THE COURT: I will call to their attention certain exhibits under the 106 series, that they may consider those, that those are part of the other evidence. I suggest they consider all the evidence and any chart of any kind is subject to my instructions on the 193 series; if it is in evidence, it is in evidence.

MR. HOFFMANN: I have not quite finished.

THE COURT: I don't want the jury to sit out there

for half an hour while we are talking. Just in a nutshell tell me what it is, so we can focus on it.

MR. HOFFMANN: I do hope that we can make the points that are vital. There is one having to do with damages, that these two series presented as alternative projections, that they did reach different results, and I should think that the jury should have itplain in its mind that they have the 106 series.

THE COURT: Even on the 106 that was sort of ruled out by me under the theory we were going to keep accumulating 42 per cent, and I would decline to charge them further.

MR. HOFFMANN: Obviously, it only analyzes for the jury the other series, and your Honor made a statement about proximate cause and about it being continuous as a basis for damage. I do not have the precise words in my mind, but I do urge your Honor that the real test is that which is found in the Supreme Court's decision in the Zenith case, and I refer you to page 9, Item 25, of my objections.

THE COURT: What is it?

MR. HOFFMANN: This is the language. The language in the Zenith case is: "The Court has repeatedly held that in the absence of more precise proof, the fact-finder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business.'"

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My objection to your Honor's charge on this point was in terms of the need to be an approximate connection between the very acts being complained of and the violation.

THE COURT: I will decline to charge all you need show is tendency to injure. That I will not charge.

MR. HOFFMANN: Whether it be the word "tendency" or some expression which indicates the reasonable probability that there exists some causal connection I don't care, but I think that it is not necessary to dissect, nor should it be dissected, all the evidence in terms of does this particular thing have an equation with damages, as long as the jury finds that there was liability. The test of this circuit, at least, applies, and that puts on the other side, really, including other possible causes of the injury; it is really a shift. My colleague here shows me this opinion concerning Ford Motor vs. Webster.

THE COURT: That is not inconsistent with anything that I charged.

MR. HOFFMANN: I hate to keep the jury longer. I except, surely, to your charge about the conflict between the interrogatory answer the testimony of Sommer, bearing in mind, your Honor, that was brought up at the last very moment of the trial. All it does is to show different

figures for the year 1971, and it was not possible for the witnesses in the courtroom to make an explanation, and so they were not put on the stand. But it does not bear, your Honor, at all on the damage structure. The damage structure is demonstrated by the books of account and show the connection between the residual number of units sold, not in terms of whether or not the 1971 year should be put on profit or loss.

THE COURT: Mr. Hoffman, as I thought about this matter last night, I was deeply troubled, becausethen this matter came out, Marshall Oreck was sitting in the courtroom, you had not rested your rebuttal case, you conferred with him -- I don't know whether you conferred with him on this matter or not, because I was not privy to that - he was available to put on before your case had rested, and here one of the officers of your client says they have a $120,000 loss in the last six months of the contract, and an accountant gets on and says they have a $170,000 profit. That is a $300,000 difference. No effort was made whatsoever to explain that to the jury, and it seems to me that this jury has to resolve that as a threshold matter. It is a factor that they have to consider. They may conclude that Marshall Oreck was in error in 1973 when he gave that figure in answer to an inter-

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rogatory, but it is still a figure that has to be considered here and has a direct bearing on damage.

MR. HOFFMANN: As to the latter, I except. As to the former, I stated at the side bar that I had spoken with Marshall Oreck in that moment when I was back there and he said he could not explain it.

THE COURT: Then the jury has to deal with that fact.

MR. HOFFMANN: Subsequent, however, to that we found out, and I would be glad to reopen the case to show it if your Honor thinks it need be done, this $170,000 was due to the fact that the Oreck bookkeeper in New Orleans postedthe expenses which occurred at that time for advertising. They went into a large advertising campaign and he did not post the returns from the advertising.

THE COURT: I am not going to let you reopen the case at this stage after the jury has been charged, and I certainly find it a puzzle for a client to answer a question of that importance and answer it as disadvantageously as he did at the time.

MR. HOFFMANN: He didn't answer it at all. He simply said he didn't know.

THE COURT: I mean in 1973 or whenever these interrogatories were answered. At that time he swore to

it as true, and the jury has to deal with it.

MR. HOFFMANN: I most respectfully except.

MR. TUROFF: Your Honor, Whirlpool would except to that portion of your charge which deals with the Schwinn violation in Canada, both that portion which deals with the liability of Whirlpool alone and that portion of the charge which deals with the fact that the jury might find damages against Whirlpool based upon the unilateral decision not to permit Oreck to market in Canada. There is no such violation charged anywhere in the pleadings, and it seems to me that we have injected a new and different issue into this case.

THE COURT: I checked this out last night. It is not as clear, but it is arguably clear from the pleadings that a Schwinn violation is contemplated by the second count, and, in any event, everybody litigated it to the fullest extent. So if there is a motion to conform the pleadings to the proof, I will grant it.

MR. HOFFMANN: I make the motion.

THE COURT: I grant it.

MR. TUROFF: My exception is shown on the record.

Now, the other exception I take on what I believe was a failure to give an instruction on the fact that the

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jury can take into account what they believe that the Oreck Corporation sold or would have sold on its own of vacuum cleaners not manufactured by Whirlpool during the period 1972 to date, because there is evidence to the effect that the Oreck Corporation was selling as many as 60,000 vacuum cleaners a year. Perhaps your Honor so instructed, but I did not hear such an instruction.

THE COURT: I think I charged, in effect, plaintiffs had to prove that they would have made net profits above the net profits that they, in fact, made, which was your charge on that issue. Your exception is noted, if it is an exception.

Anything else?

MR. TUROFF: That is all we have.

THE COURT: All right.

(Proceedings continued in the courtroom with the jury in the box.)

THE COURT: Now, ladies and gentlemen, I have nothing further to say to you by way of charge. As to Mr. Tyson and Mr.Keough, I must discharge you at this time for my thanks for your faithful attendance and your careful consideration of the issues, and may I say you have brought credit upon yourself as citizens and jurors. You are excused with my thanks.

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(Alternate jurors excused.)

THE COURT: The balance of you, ladies and gentlemen, I will now put in custody of the United States Marshal to commence your deliberations. You may speak to each other about the case in accordance with my instructions.

(Marshal sworn.)

(The jury retired to the juryroom at 12.20 p.m. commence its deliberations.)

* * *

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THE COURT: I have your note, marked now Court's Exhibit 4, which asks for the direct and cross-examination of Sparks and Sweet. There is a potential ambiguity in the note, because you would normally refer to their testimony given on the defendant Whirlpool's case, and I wanted to know whether it went beyond that, to the reading of the testimony from the depositions that were put in on the plaintiff's case. I gather from the shaking of heads that it does not go to the depositions; it goes to the testimony given on Whirlpool's case as a defendant.

THE FOREMAN: Yes.

THE COURT: Very good. Then we shall commence the direct and cross of Mr. Sparks, and then that of Mr.

Sweet.

(The testimony was read by the reporter and the jury retired to continue its deliberations at 11.30 a.m.)

* * *

(The following took place at 2.40 p.m.)

THE COURT: The jury has sent in a note, "We have reached a decision."

(The jury took its place in the jury-box.)

THE CLERK: Will the jurors please answer "Present" as your name is called.

(The clerk called the roll of the jury.)

THE CLERK: Mr.Foreman,please rise. Has the jury arrived at a verdict?

THE FOREMAN: Yes.

THE CLERK: How do you find?

THE FOREMAN: We find the defendants guilty of conspiracy in the United States and guilty of restraint of trade in Canada.

THE CLERK: What damages do you find?

THE FOREMAN: $750,000.

THE COURT: Poll the jury.

(Jury polled.)

THE COURT: Ladies and gentlemen, just so we are perfectly clear on the terminology that everyone is using, there are two counts that were submitted to you, and I take it that on the first of those counts you find the defendants liable to the plaintiff, and on the second

of those counts, which involves Canada, you find the defendants jointly liable to the plaintiff?

THE FOREMAN: Yes.

THE COURT: And your finding of damages is as to both counts?

THE FOREMAN: Yes.

In the sum of $750,000.

THE FOREMAN: Yes.

THE COURT: Did you break that finding down as between the United States and Canada, if I may ask?

THE FOREMAN: 10 per cent was for Canada and 90 per cent for the United States.

* * *